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(The Supreme Court.)

II] JULY [1961

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

T. V. R. Subbu Chetty's Family Charities .. *Appellant**

v.

M. Raghava Mudaliar and others .. *Respondents.*

Hindu law—Widow—Alienation by—Presumptive reversioner receiving benefit or ratifying—Right to dispute validity of the alienation when reversion falls open and he becomes actual reversioner.

It may be taken to be well-settled that if a presumptive reversioner is a party to an arrangement which may properly be called a family arrangement and takes benefit under it, he would be precluded from disputing the validity of the said arrangement when reversion falls open and he becomes the actual reversioner. The doctrine of ratification may also be invoked against a presumptive reversioner who though not a party to the transaction, subsequently ratifies it with full knowledge of his rights by assenting to it and taking benefit under it. It is, however, clear that mere receipt of benefit under an arrangement by which a Hindu widow alienates the property of her deceased husband would not preclude a presumptive reversioner from disputing the validity of the said alienation when he becomes the actual reversioner. It must always be a question of fact as to whether the conduct of the said reversioner on which the plea of ratification is based does in law amount to ratification properly so called.

[The plea of ratification by the plaintiff (reversioner) was not established by the defendants and as the impugned transfer was held not to be justified by legal necessity it was not binding on the reversioner.]

Appeal from the Judgment and Decree, dated the 23rd February, 1951, of the Madras High Court in O.S. Appeal No. 13 of 1948.

R. Keshva Aiyangar, Senior Advocate (*M. S. K. Aiyangar,* Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*Naunit Lal,* Advocate, with him), for Respondent No. 1.

B. K. B. Naidu, Advocate, for Respondent No. 6.

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*Civil Appeal No. 204 of 1956. 27th January, 1961.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal arises out of a suit filed by the respondent M. Raghava Mudaliar who claims to be the reversioner of Madhava Ramanuja Mudaliar. In his suit the respondent alleges that after the death of Madhava Ramanuja Mudaliar which took place on March 22, 1893, his property came into the possession of his widow Manickammal. Subsequently the said Manikammal and Rengammal, the widowed mother of the deceased Madhava Ramanuja Mudaliar alienated the properties without any legal necessity. According to the respondent the said alienation was not binding on him and so he was entitled to recover possession of the said property free of any encumbrance or charge. Manickammal died on October 18, 1941, whereas Rengammal died in June, 1921. On the death of the widow Manickammal reversion fell open and that has given a cause of action to the respondent for his present suit.

Madhava Ramanuja Mudaliar died issueless and was survived by his widow, his widowed mother, his sister Andalammal and the respondent and his sister Apurupammal who are the children of Ammakannu Ammal the second sister of Madhava Ramanuja Mudaliar, and Ethirajammal the daughter of the third sister of Madhava Ramanuja Mudaliar. To his suit the respondent impleaded the appellant Andalammal, Krishnasami Mudaliar, son of the said Apurupammal (defendant 1) and Susila Bai Ammal daughter of Ethirajammal as defendants 2 to 4. The Udayavar Temple by its sole trustee Bysani Krishnaiah Chetty was joined as defendant 5.

After her husband's death Manickammal obtained letters of administration to his estate from the High Court at Madras. It appears that the relations of the widow with her mother-in-law were embittered, and that led to disputes between them. These disputes were settled by the two widows in pursuance of the advice of certain arbitrators who mediated between them. The settlement thus reached was rcorded in writing on May 27, 1893, (Exhibit D-2). It would be relevant to refer to the main terms of the settlement at this stage. This settlement set out the properties covered by it as Serial Nos. 1 to 5. Item No. 1 which was a house in three blocks was divided between the respondent and his sister Apurupammal who were to take one share; Ethirajammal who was to take another share; and Andalammal who was to take the third share. House No. 62, which was Serial No. 2, and houses and shops Nos. 126 and 127 which were shown as Serial No. 3 were agreed to be sold, and it was settled that out of the sale proceeds the debts of the deceased Madhava Ramanuja Mudaliar and his father should be discharged; expenses incurred in obtaining the letters of administration should then be deducted along with the expenses of sale, and the balance should be divided equally between the two widows subject to a payment of Rs. 1,000 to the mother-in-law in lieu of her jewels. The two cawnies of lands which were Serial No. 4 were agreed to be given to the maternal uncle of the deceased Madhava Ramanuja Mudaliar, whereas the moveables which were shown as Serial No. 5 had to be divided half and half between the two widows. This document contained a clause which provided that,

> "in case any one of us contravenes the terms the other party shall not only cancel this agreement but his title to the estate of Madhava Ramanuja Mudaliar prior to the agreement shall in no way be affected subject to which this agreement has been entered into "

The document thus executed was attested by four attesting witnesses.

It appears that soon after this agreement was finalised Krishnasamy Mudaliar, defendant 3, objected to its validity and disputed the right of the widows to deal with the property in the manner specified in it. He was,

however, persuaded to abandon his objections and a sale deed was executed by him conveying his reversionary rights to the two widows for consideration on September 10, 1894. By this document defendant 3 purported to recognise and grant an absolute title to the two widows in regard to the estate of the deceased (Exhibit D-3). Subsequent to this document the two widows began to enjoy the properties as agreed between them.

On February 4, 1895, the two widows sold item No. 1 in Schedule II attached to the plaint, *i.e.*, Nos. 126 and 127, Anna Pillai Street and Audiappa Naik Street respectively to Thatha Venkata Raghava Subbu Chetty. The appellant is the successor in title of the said division in respect of the said item No. 1 in Schedule II. In the present appeal we are concerned only with this item.

On May 27, 1895, a composite deed of partition and administration of property of the deceased was executed by and between the two widows (Exhibit D-5). By this document the three blocks in the house shown as Serial No. 1 Exhibit D-2 were delivered into the possession of the respective donees. The maternal uncle of the deceased was given two cawnies of lands as therein stipulated and the debts of the deceased were discharged and expenses incurred in respect of the letters of administration were met. It is under these circumstances that the respondent filed his present Suit No. 56 of 1946 on the Original Side of the Madras High Court; and he claimed that the alienations made by the two widows were not binding on him and he was entitled to the possession of the property left by the deceased Madhava Ramanuja. The schedule attached to the plaint referred to four items of property, and as we have already pointed out it is only with item No. 1 out of these four items with which we are concerned in the present appeal.

In regard to the said item the appellant urged that the agreement between the two widows (Exhibit D-2) and the subsequent composite deed executed in pursuance of it (Exhibit D-5) were in the nature of a family arrangement and as such they were binding on the respondent. It was also alleged by the appellant that the respondent had received benefit under the said arrangement and by his conduct had ratified it. The appellant further pleaded that the transfer in favour of his predecessor was supported by legal necessity. Incidentally a plea of surrender was also raised by the appellant.

Mr. Justice Kunhiraman, who tried the suit, held that there was a family arrangement which bound the respondent. He also observed that the respondent had received benefit under the said arrangement and was therefore precluded from challenging its validity. The learned Judge incidentally made some observations which showed that he was inclined to uphold the plea of surrender raised by the appellant. In the result the respondent's suit was dismissed.

The respondent then took the matter in appeal and succeeded. The appeal Court held that the impugned arrangement cannot be said to be a *bona fide* family settlement which would bind the respondent. Before the appeal Court it was conceded that the plea of surrender raised by the appellant could not be sustained, and that the contention that the respondent was bound by the family arrangement could not also be sustained. It was, however, urged on behalf of the appellant that the respondent's conduct precluded him from disputing the validity of the arrangement but this argument was rejected by the appeal Court; likewise, the contentions that the transfer in favour of the appellant's predecessor was justified by legal necessity also failed. As a result of these findings the respondent's appeal was allowed, the decree passed by the trial Court was set aside, and the claim for possession made by the respondent was decreed. The respondent's suit was accordingly directed to go before the Official

Referee for ascertainment of mesne profits claimed by him. It is against this decree that the appellant has come to this Court in appeal.

The principal point which has been urged before us by Mr. R. Keshav Aiyangar on behalf of the appellant is that in substance the respondent has ratified the impugned transaction, has received benefit under it, and by his conduct has affirmed it, and so it is not open to him to challenge its validity and binding character. In support of this argument he has canvassed for our acceptance the proposition that if a person with full knowledge of his rights assents to a transaction which may otherwise be voidable at his instance and takes benefit under it, he is subsequently precluded from disputing its validity. In support of this argument he has relied on a decision of this Court in *Sahu Madho Das and others* v. *Pandit Mukand Ram and another*.[1] In that case this Court has held that it is settled law that an alienation by a widow in exercise of her powers is not altogether void but only voidable by the reversioners who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding. This Court also observed that it is a principle of general application underlying many branches of the law that a person who with full knowledge of his rights has once elected to assent to a transaction voidable at his instance and has thus elected not to exercise his right to avoid it, cannot go back on that election and avoid it at a later stage; having made his election he is bound by it. The argument is that though the respondent may not be a party to the impugned transaction, if by his conduct it can be said that he has elected to uphold it and has received benefit under it he cannot be allowed to go back upon the election. There is of course no doubt about the correctness of the principle thus enunciated, but the difficulty in the way of the appellant arises when the applicability of the said principle is tested in the light of the relevant material findings in that case. That is why it is necessary to refer very briefly to the findings of fact on which the decision in *Sahu Madho Das's case*[1] rests. In that case this Court considered the question as to whether the plaintiff Mukand Ram had assented to the impugned family arrangement, and observed that as he was not a party to the arrangement his assent to the arrangement itself and not to something else must be clearly established, and also his knowledge of the facts. Then, having thus posed the question the material evidence was examined, and it was held that the cumulative effect of the said evidence led to the reasonable inference that the plaintiff's assent was to the very arrangement itself, and his conduct as well as the conduct of his brother Kanhaiya Lal was consistent only with that hypothesis; in other words, the examination of the material evidence justified the inference that Mukand Ram had in fact elected to assent to the transaction and had received benefit under it, and so the doctrine of election or ratification precluded him from disputing the validity of the said transaction. It is, however, significant that dealing with the case of the minor sons, who were not parties either personally or through their guardians, and who did not claim title either through Pato or her daughters, this Court expressly observed that so far as they were concerned what they received were gifts pure and simple and the only assent that could be inferred from the mere acceptance of the gifts and nothing more would be assent to that particular gift and not assent to the gifts similarly made to others. This observation brings out in bold relief by contrast the relevant findings in the light of which the plaintiff was held precluded from disputing the validity of the impugned transaction.

1. (1955) S.C.J. 417 : (1955) 2 M.L.J. (S.C.) 1 : (1955) An. W.R. (S.C.) 255 : (1955) 2 S.C.R. 22.

The appellant has also relied on another decision of this Court in *Dhiyan Singh and another* v. *Jugal Kishore and another*.[1] In that case it was held that even if the impugned award was invalid the plaintiff who disputed its validity was barred from making that claim by reason of estoppel. Brijlal against whom the plea of estoppel was effectively raised appeared to have made a claim to the estate in question in 1884 when the impugned transaction took place, and it was as a result of this claim that settlement was reached and the impugned transaction effected. This Court held that even if the award which was challenged was invalid Brijlal by his conduct had precluded himself from raising the contention against the validity of the award. In coming to this conclusion this Court observed that the case before it was very similar to the one which the Privy Council had decided in *Kanhai Lal* v. *Brij Lal*.[2] When we turn to the Privy Council decision itself we find that Kanhai Lal, who was held by the Privy Council to be precluded from challenging the arrangement to which he was a party, had set up a title in himself on the strength of an alleged adoption and when, having regard to the said title, a settlement was reached and a compromise arrangement was made, it was held by the Privy Council that the doctrine of estoppel came into play. Kanhai Lal, who subsequently became a reversioner according to the Privy Council, was bound by the previous arrangement and "cannot now claim as a reversioner". These two decisions also emphasise the fact that if a person having full knowledge of his rights as a possible reversioner enters into a transaction which settles his claim as well as the claim of his opponents at the relevant time, he cannot be permitted to go back on that arrangement when reversion actually falls open.

There are two other decisions of the Privy Council to which reference may be made. In *Rangaswami Gounden* v. *Nachiappa Gounden*,[3] the Privy Council had to deal mainly with the question of surrender, its theory and its essential features. Incidentally it had also to deal with the case of reversioner who had taken from an alienee from a Hindu widow a mortgage of a property which included a part of the property alienated, and the question raised was whether by reason of the fact that the reversioner had a mortgage of the said property he was precluded from challenging the validity of the said alienation; and the Privy Council held that he was not so precluded. In dealing with this aspect of the question the Privy Council observed that it is well-settled that though he who may be termed a presumptive reversionary heir has a title to challenge an alienation at its inception, he need not do so, but is entitled to wait till the death of the widow has affirmed his character, a character which up to that date might be defeated by birth or by adoption. The Privy Council then examined the nature of the mortgage, the properties included in it, and observed that the said mortgage consisted of 2|14ths of the mitta which had come to the mortgagors in right of their own succession, and the remaining share had come to them through the impugned deed of gift. Then it was observed that at the time of the mortgage the mortgagee did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift; and the Privy Council asked "why should he not take all that the mortgagors could give or propose to give". "To hold that by doing so", observed the Privy Council,

> "he barred himself from asserting his own title to a part of what was mortgaged seems to their Lordships a quite unwarrantable proposition".

1. (1952) S.C.J. 142 : (1952) S.C.R. 478.
2. (1919) 35 M.L.J. 459 : L.R 45 I.A. 118 (P.C.).
3. (1918-19) 36 M.L.J. 493 : L.R. 46 I.A. 72: I.L.R. 42 Mad. 523 (P.C.).

This decision shows that the principle of election or estoppel or ratification must be applied with due circumspection and the mere fact that the reversioner has received some benefit under the transaction or has not challenged the validity of the transaction when it took place cannot bar his rights as a reversioner when reversion in his favour falls open.

The last case on which reliance has been placed by the appellant is the decision of the Privy Council in *Ramgouda Annagouda and others* v. *Khansaheb and others.*[1] In this case the widow of the last male holder had alienated nearly the whole of the property of her husband by three deeds executed and registered on the same day. One of the deeds was in favour of a presumptive reversioner. The Privy Council held that the three deeds had to be regarded as forming one transaction entered into by all the persons interested in the properties, and that after the reversion fell open, the reversioners who were parties to the said transactions were precluded from disputing the two alienations by reason of their conduct. According to the Privy Council the three deeds in question were inseparably connected together and in that view Annagouda, the reversioner, who challenged two of the three transactions, not only consented to the sale to Shivgouda and the gift to Basappa—which were the two transactions impeached—but these dispositions formed part of the same transaction by which he himself acquired a part of the estate. Thus it may be taken to be well-settled that if a presumptive reversioner is a party to an arrangement which may properly be called a family arrangement and takes benefit under it, he would be precluded from disputing the validity of the said arrangement when reversion falls open and he becomes the actual reversioner. The doctrine of ratification may also be invoked against a presumptive reversioner who, though not a party to the transaction, subsequently ratifies it with full knowledge of his rights by assenting to it and taking benefit under it. It is, however, clear that mere receipt of benefit under an arrangement by which a Hindu widow alienates the property of her deceased husband would not preclude a presumptive reversioner from disputing the validity of the said alienation when he becomes the actual reversioner. It must always be a question of fact as to whether the conduct of the said reversioner on which the plea of ratification is based does in law amount to ratification properly so-called. It is in the light of these principles that we must now consider the relevant facts in the present appeal.

There can be no doubt that the transaction which took place on May 27, 1893, as a result of the dispute between the two widows and with the intervention of the well-wishers of the family is not a family arrangement as understood under Hindu Law. This position was conceded before the High Court and is not disputed before us (Exhibit D-2). Similarly the sale deed which was executed by defendant 3 in favour of the two widows is of no assistance because it was obviously a sale by defendant 3 of his reversionary rights which were then no better than *spes successionis* and as such this transaction (Exhibit D-3) cannot help to validate the earlier arrangement between the two widows. The composite document (Exhibit D-5) of May 27, 1895, is in substance no more than an alienation no doubt executed for the purpose of carrying out the original arrangement between the two widows. Thus in dealing with the question as to whether the respondent is precluded from challenging the validity of the impugned transaction it is necessary to bear in mind that the original transaction is not a transaction in the nature of a family arrangement. Besides, he was then a minor and admittedly he was not a party to any of the said transactions.

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1. (1926-27) 53 M.L.J. 350 : L.R. 54 I.A. 396 (P.C.).

It is, however, urged that the respondent obtained a certificate or a patta from the Collector in regard to the property conveyed to him under Exhibit D-5, and the argument is that he has deliberately withheld the said patta because he apprehended that if produced the patta would go against him. The explanation given by the respondent for not producing the patta is attacked as unsatisfactory, and it is urged that the said explanation cannot possibly conceal his intention to keep back the document from the Court. In his cross-examination the respondent stated that the Collector's certificate which had been given to him by his grand-mother had been filed by him in Suit No. 495 of 1916 in the City Civil Court, and he added that his advocate in the said suit had not returned the document to him. We may assume that the respondent has not produced the document though it was in his possession; but we have on the record two documents which were issued to the other donees, and all that the appellant is entitled to assume is that a similar document had been issued in favour of the respondent. In our opinion, the two documents on the record do not assist the appellant's argument that any representation had been made by the respondent to the Collector before he obtained a patta in his favour. In fact the issue of the patta is a routine matter which would necessarily follow on the execution of the registered sale deed (Exhibit D-5). On the registration of the said document persons who got certain immoveable properties under it were given the certificates by the Collector in ordinary course, and so no argument can be built up against the respondent that the acceptance of the patta amounts to the ratification of the original transaction of sale.

It is then urged that in Civil Suit No. 495 of 1916 filed in the City Civil Court at Madras by Apurupammal against the respondent and another, the respondent filed the written statement in which he admitted the validity of the impugned transaction. It appears that the plaintiff in that suit had based her claim on the said impugned transaction, and in respect of the said claim the respondent had alleged in paragraph 2 of his written statement that he admitted that in consequence of certain disputes which arose between the mother and the widow of the deceased Govinda Mudaliar a compromise settlement was arrived at in pursuance of which some transfers were effected. This, it is said, amounts to an admission of the validity of the said transaction (Exhibit D-15). This argument, however, fails to take notice of the fact that while referring to the said compromise settlement the respondent had expressly added that the said compromise settlement was obviously to take effect only during life tenancy of the widow of the deceased Govinda Mudaliar (Exhibit P-3). In other words, taking the statement as a whole, as we must, the respondent looked upon the said compromise settlement as an alienation made by the widow and as intended to take effect during her lifetime and no more. In other words, far from supporting a plea of ratification against the respondent this statement strengthens his case that he took the benefit with the knowledge and under the belief that the arrangement under which the said benefit flowed was intended to be operative during the lifetime of the widow, and as such he had no occasion to challenge its validity whilst the widow was alive.

A somewhat similar argument is based on the conduct of the respondent in relation to Civil Suit No. 1117 of 1921 filed by Masilamani Mudaly, the sister's son, and the deceased Govinda Mudaliar in the Madras High Court (Exhibit P-16). To this suit the respondent was impleaded as defendant 7. In this suit the said plaintiff had challenged the validity of the arrangement, and asked for appropriate injunctions against defendant 6 to the suit Thuggi Kondiah Chetty, Trustee of Udayavar Koil, and other defendants from dealing with the property to the prejudice of the reversionary right of the plaintinff. It is unnecessary to refer to the pleadings in the said suit or to specify in detail

the reliefs claimed. The only point which is relevant to consider is that the reversioner had challenged the arrangement in question. The respondent by his written statement had purported to support the plea made by the plaintiff, and had added that he was not personally aware of any attempt on the part of defendants 2 to 4 to alienate the properties in respect of their possession and enjoyment. This suit, however, did not proceed to a trial as it was dismissed for want of prosecution, and the argument is that since the respondent had supported the plaintiff in the said suit it was necessary that he should have got himself transposed as a plaintiff, when he found that the original plaintiff was allowing the suit to be dismissed for non-prosecution. In our opinion, this argument is far-fetched and cannot possibly sustain the plea of ratification against the respondent. If the respondent took possession of the property under the arrangement with the distinct understanding that the arrangement was to last only during the lifetime of the widow, we see no justification for the assumption that he should have carried on Civil Suit No. 1117 of 1921 or should in fact have challenged the said arrangement at all.

The last argument urged in support of the plea of ratification is based on the oral evidence given by the respondent in the present case. The respondent was asked about the quarrels between the mother and the widow of the deceased Mudaliar, and he said that they were living together and that there were quarrels between them. Then he was asked as to whether he got the property under the impugned arrangement, and he said that his grandmother gave him the house with the Collector's certificate and told him that she was going to die soon and so he may take the house. The respondent also admitted that since the house was thus delivered to him and to his sister they were in possession of it and in enjoyment of its income. The respondent then stated that he was not aware of the document of 1895 until 1916, and that he came to know about the division between the two widows only in 1910. It is urged that this statement should not be believed, and that the reluctance of the respondent to disclose the truth should lead to the inference that he knew all about the impugned transaction and its effect, and that when he took possession of the property allotted to him under the said transaction he knew fully well about his rights and he accepted the benefits with the object of ratifying the whole transaction. In our opinion there is no substance in this argument.

In this connection it is relevant to remember that until Act II of 1929 was passed a sister's son, like the respondent, would have had very few chances of becoming an actual reversioner; he would have come in the list of bandhus; and so it would be difficult to assume that at the time when the respondent accepted the gift of the house he knew about his rights as a possible reversioner. Besides, the benefit which he obtained under the impugned transaction could also in substance have been claimed by him under an earlier arrangement entered into between Govinda Mudaliar and Madhava Ramanuja Mudaliar on February 7, 1887, (Exhibit D-1). Having regard to the arrangement disclosed by the said document the benefit given to the respondent and the other children of the sisters of the deceased Mudaliar may as well have been based on the said arrangement, and all that the transactions of 1893 and 1895 did was to give effect to it (Exhibits D-2 and D-5). Besides, as we have already pointed out, in 1893 the respondent was a minor, and when subsequent to 1895 he took possession of the property it does not appear on evidence that he knew that the intention of the widows was to treat the property as absolute owners and to convey absolute titles to the respective donees and transferees under the said transaction. He also could not have known about his rights as a possible reversioner. Therefore, in our opinion, the High Court was right in holding that the appellant had failed to establish his plea of ratification against the

respondent Indeed, to hold otherwise would be in the words of the Privy Council "a quite unwarrantable proposition".[1]

That leaves the question of legal necessity to be considered. The High Court has held that the impugned transfer cannot be said to have been justified by legal necessity; and, in our opinion, the finding of the High Court on this point is obviously right. In dealing with this question it may be relevant to recall that the widow of the deceased Mudaliar had obtained letters of administration to the estate of the deceased on April 26, 1893, and, as usual, in issuing the letters limitation had been imposed upon the widow that she could not deal with or transfer the property in question without the requisite sanction. There is some force in the argument urged before us by Mr. Sastri on behalf of the respondent that it was with a view to avoid the necessity to obtain the requisite sanction that the widow of the deceased Mudaliar was persuaded by her mother-in-law to enter into the impugned transaction under the guise of a family arrangement. The document itself (Exhibit D-5) does not purport to be justified by legal necessity. In terms it purports to give effect to the original arrangement of 1893 (Exhibit D-2); and if the said arrangement is not valid as a family arrangement the subsequent transfer would also be invalid. Besides, out of a total consideration of about Rs. 10,000 the amount of Rs. 776 can be taken to represent the debts due by the deceased Mudaliar; the rest of the items of consideration cannot be treated as constituting a legal necessity at all. The amount of Rs. 558 was the expense incurred for executing the document; similarly the amount of Rs. 409 representing the funeral expense of the deceased Mudaliar, had apparently been spent by the widow who wanted to reimburse herself and that cannot be a legal necessity. The other items of consideration do not even purport to be for legal necessity. Therefore, in our opinion, the conclusion is inescapable that the impugned transfer is not justified by legal necessity.

The result is the appeal fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—S. K. DAS, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Hoshiarpur Central Co-operative Bank, Ltd. Hoshiarpur .. *Appellant**

v.

The Commissioner of Income-tax, Simla .. *Respondent.*

Income-tax—Notification R. Dis. No. 291-I.T.|25, dated 25th August, 1925, as subsequently amended—Scope—Exemption of co-operative societies from income-tax—If extends to profits from distribution of sugar and standard cloth with permission of the authorities.

Where a Co-operative Bank deals in sugar and standard cloth with special permission of the authorities and earns income from such activities, such income is exempt from tax under Item 2 of the Government of India Notification F.D. (C.R.) Notification R. Dis. No. 291-I-T.|25, dated 25th August, 1925, as subsequently amended. The words of the notification are wide enough to include any business (whether with members or with non-members).

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1. (1918-19) 36 M.L.J. 493: L.R. 46 I.A. 72 (87): I.L.R. 42 Mad. 523 (P.C.).

*Civil Appeal No. 238 of 1955. 2nd August, 1960.

Appeal from the Judgment and Order, dated the 27th May, 1953, of the Punjab High Court in Civil Reference No. 3 of 1952.

Deva Singh Randhava and *K. L. Mehta*, Advocates, for Appellant.

M. C. Setalvad, Attorney-General for India and *K. N. Rajagopal Sastri*, Senior Advocate (*D. Gupta*, Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal against the judgment and order of the High Court of Punjab with the certificate of the Court granted under section 66-A (2) of the Indian Income-tax Act.

The Hoshiarpur Central Co-operative Bank, Ltd., Hoshiarpur, hereinafter referred to *as the Bank*, is the appellant, and the Commissioner of Income-tax, Simla, is the respondent. For the assessment years 1948-49 and 1949-50, the Income-tax Officer included in the assessment of the Bank certain income which had accrued to the Bank as profits from trading in controlled commodities like sugar, cloth, kerosene, etc., which the Bank was allowed to deal in, with the approval of the Registrar of Co-operative Societies conveyed in a letter, dated September 28, 1954. The Bank claimed exemption under a notification issued under section 60 of the Income-tax Act, but the contention was not accepted. On appeal, the Appellate Assistant Commissioner reversed the decicion, which, on further appeal, was reversed by the Appellate Tribunal, Delhi Branch. The Appellate Tribunal, however, raised, and referred the following question to the High Court under section 66 (1) of the Income-tax Act:

"Where a co-operative bank deals in sugar and standard cloth with special permission of the authorities and earns income from such activities, is such income exempt from tax under Item 2 of the Government of India Notification F.D. (C.R.) Notification R. Dis. No. 291-I-T.|25, dated 25th August, 1925, as subsequently amended (Income-tax Manual, 10th Edition, Part II, pages 257-258) ?".

The High Court answered the question against the Bank, but certified the case as fit for appeal to this Court, and hence this appeal.

It is admitted on all hands that the profits were made from trading in certain commodities with the approval of the Registrar of Co-operative Societies. The quantum and the manner in which those profits were made, are not in dispute. The short question in this appeal is whether the exemption granted by the notification covers the case. The notification reads as follows:

"Income included in total income but exempt from both income-tax and super-tax:

The following classes of income shall be exempted from the tax payable under the said Act, but shall be taken into account in determining the total income of an assessee for the purposes of the said Act:—

1. ....

2. The profits of any Co-operative Society other than the Sanikatta Saltowners' Society in the Bombay Presidency for the time being registered under the Co-operative Societies Act, 1912 (II of 1912), the Bombay Co-operative Societies Act, 1925 (Bombay Act VII of 1925), the Burma Co-operative Societies Act, 1927 (Burma Act VI of 1927) or the Madras Co-operative Societies Act, 1932 (Madras Act VI of 1932), or the dividends or other payments received by the members of any such society out of such profits.

Explanation: For this purpose the profits of a Co-operative Society shall not be deemed to include any income, profits or gains from:—

(*i*) Investment in (*a*) securities of the nature referred to in section 8 of the Indian Income-tax Act, or (*b*) property of the nature referred to in section 9 of that Act:

(*ii*) dividends, or

(*iii*) the 'other sources' referred to in section 12 of the Indian Income-tax Act."

The Income-tax Officer held that the profits made by the Bank were not the profits in a co-operative venture but from trading with outsiders, and that, therefore, para. 2 of the notification did not cover them. He also held that this income fell within "other sources" referred to in item (*iii*) of the *Explanation*. The Appellate Assistant Commissioner held that these were profits of a Co-operative Society, and were within para. (2), and were, therefore, exempt from tax. Both the Tribunal and the High Court accepted the reasoning of the Income-tax Officer with regard to para. 2, but the High Court did not express any opinion as to whether the third item of the *Explanation* applied to the case or not.

Before us, the learned Attorney-General appearing for the Department did not put his case on the *Explanation*, and nothing more need be said about it. It may, however, be mentioned that "other sources" there has reference to the scheme of section 6 of the Indian Income-tax Act, and profits from business of whatever kind, are dealt with under section 10 of the Act. The short question thus is whether para. 2 is confined only to profits made by a Co-operative Society from transactions with its own members and does not cover profits made in business with outsiders.

It may be pointed out that there are some cases to be found, in which it was held, before the notification was amended by the addition of the *Explanation*, that the second para. exempted profits made by a Co-operative Society in transactions with its members and not to profits made in any other way. The question is whether such a restricted meaning can be imputed to the very wide and general terms in which para. 2 is couched.

The question is plainly one of construction of the notification. In support of the case of the Department, the learned Attorney-General relies on two arguments. He first refers to the opening words of the second para. of the notification, *viz.*, "The profits of any Co-operative Society". These words, it is argued, refer to profits made by a Co-operative Society in its business as a pure Co-operative Society, or, in other words, in business with its own members within the four corners of the Co-operative Societies Act, 1912 and the bye-laws made under that Act.

No doubt, a Co-operative Society primarly exists for business with members and not for business with non-members; but the words of the notification and even those more specifically relied upon, are wide enough to include any business whether of the one kind or other. It cannot be denied that the Bank is a Co-operative Society and is claiming the exemption only as such, and further that it is claiming the exemption in respect of profits from a business carried on by it. It was for this reason that the attempt to bring the profits within "other sources" covered by section 12 of the Indian Income-tax Act was rightly abandone in this Court. If this is the obvious position, it follows that the words "the profits of any Co-operative Society" are wide enough to cover profits from any business, and there is nothing to show that the profits there mentioned are only the profits from business with members.

It is next argued that a Co-operative Society exists for business with members, and that the Co-operative Societies Act and the bye-laws of the Bank reflect this character of the business undertakings. This intention underlying the Co-operative Societies Act and the bye-laws, it is urged, is the key to the interpretation of the notification, and it must, therefore, be limited to profits from business with members only. In support of this argument, reference is made to observations in *The Madras Central Urban Bank, Ltd.* v. *Commissioner*

of *Income-tax*,[1] *The Madras Provincial Co-operative Bank, Ltd.* v. *Commissioner of Income-tax*[2] and *Commissioner of Income-tax, Burma* v. *The Bengalee Urban Co-operative Credit Society, Ltd.*[3] where it was pointed out that the notification covered only profits from business with members. The first two cases were of interest derived from moneys invested in Government Securities to comply with orders of Government to the Societies to keep 40 per cent. of the total liabilities always ready at hand, and it was said that the profits were not from business with members. In the last of the three cases, it was pointed out that the exemption was grounded on the principle that 'a person cannot make a loss or profits out of himself', and strictly speaking, only such profits as were made in business with members were exempt.

The position since these cases were decided has been materially altered by the addition of the *Explanation*. The *Explanation* now takes us back to the kinds of income to be found in section 6 of the Indian Income-tax Act where business profits are, in a category by themselves, more exhaustively treated in section 10. There are other heads of income of distinct characteristics which are treated separately, and then there is a residuary head which includes income from "other sources" which for that reason are innominate. The *Explanation* cannot be said to imply a general approval of the earlier decisions. Such a conclusion does not necessarily follow, because if the paragraph of the notification was clear enough there was hardly any need for the *Explanation*. The addition of the *Explanation* clears once for all any doubt that might have arisen as to the ambit of the word "profits". After the addition of the *Explanation* and even before it, the word denoted profits from business and not income which arose, apart from business.

It must not be overlooked that at the time when the notification was first issued and also when it was amended, it was not even contemplated that Co-operative Societies would be permitted to deal in commodities in short supply with a view to ensuring their equitable distribution among the consumers. It was, however, always open to the appropriate Government to allow a Society to extend its business operations to trading with persons other than its members subject to conditions and restrictitons, *vide* section 31 of the Co-operative Societies Act. This has, in fact, been done here.

Once there is this extension of the business of a Co-operative Society, the general words of the notification include the profits from such business within the exemption, and it would require more than a supposed underlying intention to negative the exemption. To gather the meaning of the notification in the light of an alleged intention is to reverse the well-known canon of interpretation. In our opinion, the profits were exempt under the notification, and the answer to the question ought to have been in the affirmative.

In the result, we allow the appeal with costs here and in the High Court.

Appeal allowed

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1. (1929) 56 M.L.J. 481 : I.L.R. 52 Mad. 837 (F.B.).
2. (1933) 64 M.L.J. 640 : I.L.R. 56 Mad. 640 (F.B.).
3. (1933) I.L.R. 11 Ran. 521.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—S. J. IMAM, J. L. KAPUR, K. C. DAS GUPTA, RAGHUBAR DAYAL AND RAJAGOPALA AYYANGAR, JJ.

Manohar Lal .. *Appellant**

v.

The State of Punjab .. *Respondent.*

Punjab Trade Employees Act (1940), *section* 7 (1)—*Constitutionality—Applicability to commercial establishments in which no employees were employed—Constitution of India* (1950), *Article* 19 (1) (g) *and* (6)—*Scope.*

The Punjab Trade Employees Act (1940), is in effect the exercise of social control over the manner in which business should be carried on—regulated in the interests of the health and welfare not merely of those employed in it but of all those engaged in it. A restriction imposed with a view to secure this purpose would clearly be saved by Article 19 (6) of the Constitution. The provisions of section 7 (1) of the Act requiring every shop or commercial establishment to remain closed on a 'close day' might be sustained on another ground, *viz.*, with a view to avoid evasion of the provisions specifically designed for the protection of workmen employed. To require a shop-keeper, who employs one or two men, to close and permit his rival, who employs perhaps a dozen members of his family, to remain open, clearly places the former at a grave commercial disadvantage. To permit such a distinction might well engender discontent and in the end react upon the relations between employer and employed. The Legislature may have felt it necessary, in order to reduce the possibilities of evasion to a minimum, to encroach upon the liberties of those who would not otherwise have been affected.

Appeal from the Judgment and Order, dated the 23rd May, 1956, of the Punjab High Court in Criminal Revision No. 1058 of 1954.

K. L. Arora, Advocate, for Appellant.

N. S. Bindra, Senior Advocate, (*R. H. Dhebar,* Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal on a certificate under Articles 132 and 134 (1) of the Constitution granted by the High Court of Punjab raises for consideration the constitutionality of section 7 (1) of the Punjab Trade Employees Act, 1940.

The appellant—Manohar Lal—has a shop at Ferozepore Cantonment in which business is carried on under the name and style of 'Imperial Book Depot'. Section 7 of the Punjab Trade Employees Act, 1940 (hereinafter called the Act), enacts:

"7. (1) Save as othewise provided by this Act, every shop or commercial establishment shall remain closed on a close day.

(2) (i) The choice of a close day shall rest with the occupier of a shop or commercial establishment and shall be intimated to the prescribed authority within two months of the date on which this Act comes into force,"

to extract the provision relevant to this appeal. The appellant had chosen Friday as "the close day", *i.e.*, the day of the week on which his shop would remain closed. The Inspector of Shops and Commercial Establishments, Ferozepore Circle, visited the appellant's shop on Friday, the 29th of January, 1954, and found the shop open and the appellant's son selling articles. Obviously, if section 7 (1) were valid, the appellant was guilty of a contravention of its terms and he was accordingly prosecuted in the Court of the

*Cr. A. No. 173 of 1956. 11th November, 1960.

Additional District Magistrate, Ferozepore, for an offence under section 16 of the Act which ran:

"Subject to the other provisions of this Act, whoever contravenes any of the provisions of this Act..............................shall be liable on conviction to a fine not exceeding twenty-five rupees for the first offence and one hundred rupees for every subsequent offence."

The appellant admitted the facts but he pleaded that the Act would not apply to his shop or establishment for the reason that he had engaged no strangers as employees but that the entire work in the shop was being done by himself and by the members of his family, and that to hold that section 7 (1) of the Act would apply to his shop would be unconstitutional as violative of the fundamental rights guaranteed by Articles 14, 19 (1) (*f*) and (*g*) of the Constitution. The Additional District Magistrate rejected the plea raised by the appellant regarding the constitutionality of section 7 (1) in its application to shops where no "employees" were engaged and sentenced him to a fine of Rs. 100 and simple imprisonment in default of paymennt of the fine (since the appellant had been convicted once before). The appellant applied to the High Court of Punjab to revise this order, but the Revision was dismissed. The learned Judges, however, granted a certificate of fitness which has enabled the appellant to file the appeal to this Court.

Though the validity of section 7 (1) of the Act was challenged in the High Court on various grounds, learned Counsel who appeared before us rested his attack on one point. He urged that the provision violated the appellant's right to carry on his trade or business guaranteed by Article 19 (1) (*g*) and that the restriction imposed was not reasonable within Article 19 (6) because it was not in the interest of the general public. Learned Counsel drew our attention to the Long Title of the Act reading

"An Act to limit the hours of work of Shop Assistants and Commercial Employees and to make certain regulations concerning their holidays, wages and terms of service"

and pointed out that the insistence on the appellant to close his shop, in which there were no "employees", was really outside the purview of the legislation and could not be said to subserve the purposes for which the Act was enacted. In short, the submission of the learned Counsel was that the provision for the compulsory closure of his shop for one day in the week served no interests of the general public and that it was unduly and unnecessarily restrictive of his freedom to carry on a lawful trade or business, otherwise in accordance with law, as he thought best and in a manner or mode most convenient or profitable.

We are clearly of the opinion that the submissions of the learned Counsel should be repelled. The Long Title of the Act extracted earlier and on which learned Counsel placed considerable reliance as a guide for the determination of the scope of the Act and the policy underlying the legislation, no doubt, indicates the main purposes of the enactment but cannot, obviously, control the express operative provisions of the Act, such as for example the terms of section 7 (1). Nor is the learned Counsel right in his argument that the terms of section 7 (1) are irrelevant to secure the purposes or to subserve the underlying policy of the Act. The ratio of the legislation is social interest in the health of the worker who forms an essential part of the community and in whose welfare, therefore, the community is vitally interested. It is in the light of this purpose that the provisions of the Act have to be scrutinized. Thus, section 3 which lays down the restrictions subject to which alone "young persons", defined as those under the age of 14, could be employed in any shop or commercial establishment, is obviously with a view to ensuring the health of the rising generation of citizens. Section 4 is concerned with imposing restrictions regarding the hours of work

which might be extracted from workers other than "young persons." Section 4 (1) enacts:

"Subject to the provisions of this Act, no person shall be employed about the business of a shop or commercial establishment for more than the normal maximum working hours, that is to say, fifty-four hours in any one week and ten hours in any one day."

bringing the law in India as respects maximum working hours in line with the norms suggested by the International Labour Convention. Sub-clauses (4) and (5) of this section are of some relevance to the matter now under consideration:

"(4) No person who has to the knowledge of the occupier of a shop or commercial establishment been previously employed on any day in a factory shall be employed on that day about the business of the shop or commercial establishment for a longer period than will, together with the time during which he has been previously employed on that day in the factory, complete the number of hours permitted by this Act.

(5) No person shall work about the business of a shop or commercial establishment or two or more shops or commercial establishments or a shop or commercial establishment and a factory in excess of the period during which he may be lawfully employed under this Act."

It will be seen that while under sub-clause (4) employers are injuncted from employing persons who had already worked for the maximum number of permitted hours in another establishment, sub-clause (5) lays an embargo on the worker himself from injuring his health by overwork in an endeavour to earn more. From this it would be apparent that the Act is concerned—and properly concerned—with the welfare of the worker and seeks to prevent injury to it, not merely from the action of the employer but from his own. In other words, the worker is prevented from attempting to earn more wages by working longer hours than is good for him. If such a condition is necessary or proper in the case of a worker, there does not seem to be anything unreasonable in applying the same or similar principles to the employer who works on his own business. The learned Judges of the High Court have rested their decision on this part of the case on the reasoning that the terms of the impugned section might be justified on the ground that it is designed in the interest of the owner of the shop or establishment himself and that his health and welfare is a matter of interest not only to himself but to the general public. The legislation is in effect the exercise of social control over the manner in which business should be carried on—regulated in the interests of the health and welfare not merely of those employed in it but of all those engaged in it. A restriction imposed with a view to secure this purpose would, in our opinion, be clearly saved by Article 19 (6).

Apart from this, the constitutionality of the impugned provision might be sustained on another ground also, *viz.*, with a view to avoid evasion of provisions specifically designed for the protection of workmen employed. It may be pointed out that acts innocent in themseles may be prohibited and the restrictions in that regard would be reasonable, if the same were necessary to secure the efficient enforcement of valid provisions. The inclusion of a reasonable margin to ensure effective enforcement will not stamp a law otherwise valid as within legislative competence with the character of unconstitutionality as being unreasonable. The provisions could, therefore, be justified as for securing administrative convenience and for the proper enforcement of it without evasion. As pointed out by this Court in *Manohar Lal* v. *The State*[1] (when the appellant challenged the validity of this identical provision but on other grounds):

"The Legislature may have felt it necessary, in order to reduce the possibilities of evasion to a minimum, to encroach upon the liberties of those who would not otherwise have been affected...............To require a shopkeeper, who employs one or two men to close and permit his rival, who employs perhaps a dozen members of his family, to remain open, clearly places the former at a grave commercial disadvantage. To permit

1. (1951) S.C.J. 475: (1951) 2 M.L.J. 139 : (1951) S.C.R. 671 at 675.

such distinction might well engender discontent and in the end react upon the relations between employer and employed."

We have, therefore, no hesitation in repelling the attack on the constitutionality of section 7 (1) of the Act. The appeal fails and is dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—S. K. DAS, J. L. KAPUR AND M. HIDAYATULLAH, JJ.

Vadilal Panchal .. *Appellant**

v.

Dattatraya Dulaji Ghadigaonkar and another .. *Respondents.*

Criminal Procedure Code (V of 1898), section 203—Scope—Self-defence—If can be considered by the Magistrate as established by mere report of the Police.

When a Magistrate directs an enquiry under section 202, Criminal Procedure Code, for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it is open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer. He is not bound as a matter of law to issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial. It is open to a Magistrate to come to the conclusion that on the materials before him no offence had been made out and there was no sufficient ground for proceeding further on the complaint.

Appeal by Special Leave from the Judgment and Order, dated the 13th September, 1957, of the Bombay High Court in Criminal Petition Application No. 834 of 1957, arising out of the Judgment and Order, dated the 30th April, 1957, of the Presidency Magistrate, IV Class, Girgaon, Bombay, in Case No. 6|I & R of 1956.

H. M. Choksi, Rajni Patel, B. K. B. Naidu and *I. N. Shroff,* Advocates, for Appellant.

Janardan Sharma, Advocate, for Respondent No. 1.

Purshottam Trikamdas, Senior Advocate (*H. R. Khanna,* Advocate and *D. Gupta,* Advocate for *R. H. Dhebar,* Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

S. K. Das, J.—This is an unfortunate case in which a complaint filed in the Court of the Presidency Magistrate, Bombay, on October 31, 1956, by one Dattatraya Dulaji Ghadigaonkar, respondent herein, has to be finally disposed of in the year 1960 in circumstances which we shall state at once. On June 3, 1956, in the evening, a public meeting was held at a place called Chowpatty in Bombay which was to be addressed by the Prime Minister of India. The meeting was called in connection with an agitation which was then going on for the reorganisation of the State of Bombay. There was considerable disturbance at the meeting as a result whereof it had to be dispersed, and large crowds of people began to wander about in various localities around Chowpatty including an area round Charni Road Station. The case of the complaining respondent

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*Cr. A. No. 117 of 1958. 6th May, 1960.

was that at about 8 P.M. his younger brother Sitaram was crossing Queen's Road near a building called Laud Mansion. At that time there was a large crowd on the road and members of that crowd were stopping vehicles passing by that road. One taxi cab which had come from the direction of the Opera House and was going towards Churchgate was already stopped. Sitaram was then accompanied by Sashikant Kamtekar and Nand Kumar Vagal. When these three had crossed the road, they heard the reports of revolver shots and on looking back they found that a person called Bhayya was injured by one of the shots and fell down on the footpath. Sitaram and his friends went to help Bhayya; at this stage, another shot was fired by one of the occupants of a blue car which was near the taxi cab referred to earlier. Sitaram was hit on his chest, and the bullet having entered the chest cavity injured the right ventricle of the heart. Sitaram was removed to the G. T. Hospital but died before medical assistance could be given. Dr. H. S. Mehta, Police Surgeon, who made a post-mortem examination of the dead body, opined that Sitaram died of shock and haemorrhage as a result of the gun shot wound he had received. The doctor further said that the charring round the wound indicated that the shot had been fired from a distance of 2 to 18 inches only.

The case of the respondent was that Vadilal Panchal, appellant before us, fired the shot from the blue car. The occupants of the car were K. K. Shah, advocate, his son Vinay, and one Ratilal Sanghvi on the back seat, and the appellant and chauffeur Mohiddin on the front seat. K. K. Shah was mentioned in the complaint as one of the complainant's witnesses. He was examined and said that after the meeting was over, he and his companions were returning in his car to his house. Because of the trouble, the car travelled by a longer route and when it reached Queen's Road, there were large crowds on that road who were pelting stones, shouting slogans and committing other acts of violence: a public Bus was burnt, and a taxi cab which was proceeding ahead of K. K. Shah's car was stopped. Some three or four hundred people surrounded his car, pelted stones and shouted "maro, maro". Some of them attempted to drag out Ratilal Sanghvi who occupied a corner seat; some caught hold of the appellant by his neck and hair and wanted to drag him out of the car. The appellant then opened fire with his revolver. The rioters then held back, and the way was clear for the car to pass. The car then drove away and after some time K. K. Shah and the appellant went to Gamdevi Police Station where the latter made a report of what had happened. The appellant was sent to Nair Hospital where he was medically treated and allowed to go.

The Coroner of Bombay held an inquest into the death of Sitaram at which K. K. Shah, Shashikant Kamtekar and several other witnesses were examined. The Coroner's Jury returned a verdict that Sitaram died of the gunshot wound caused by a bullet fired by the appellant "under such circumstances as would render the firing to be in exercise of the right of private defence and as such justified". This verdict was returned on October 16, 1956. Sometime earlier, on July 3, 1956, to be precise, the complaining respondent had made an enquiry through his advocate from the Commissioner of Police, Bombay, as to whether the appellant had been arrested: the reply received was that the enquiries made by the police did not reveal any offence having been committed by the appellant and the police proposed to take no action.

On October 31, 1956, the respondent filed his complaint. The learned Presidency Magistrate to whom the complaint was made referred it to the

Superintendent of Police, C. I. D., for enquiry and report. Presumably, he acted under section 202 of the Code of Criminal Procedure. On November 15, 1956, the Superintendent of Police submitted the report of his Inspector in which it was stated:

"From the exhaustive enquiries made immediately after the incident it was disclosed that Shri Vadilal Panchal was justified in resorting to firearms in self-defence of himself and other occupants of the motor car".

On January 17, 1957, the learned Magistrate gave the respondent another opportunity to examine his witnesses before the enquiring officer, because by reason of a revision application made to the High Court earlier against the order referring the case to the police for enquiry, the respondent did not produce his witnesses before the enquiring officer. The enquiring officer then examined all the witnesses and submitted his report on March 12, 1957. This time also the enquiring officer said:

"From their statements and other evidence on record, it is clear that Shri Vadilal Panchal opened fire in the exercise of his right of private defence, which verdict the learned Coroner's Jury also brought after a protracted hearing of the Inquest Proceedings. Copies of all statements recorded by me, are attached for reference".

On April 30, 1957, the learned Presidency Magistrate considered the report of the enquiring officer in great detail with reference to the statements of all the witnesses and said:

"The Police have recorded in detail the statements of all witnesses produced by the complainant as well as of all the occupants of the car. There is, therefore, material on record showing fully whether the circumstances existed making out the right of private defence available to the accused. The fact whether the case falls within one of the exceptions or not can be established on the evidence of the witnesses produced by the prosecution itself though of course the burden of proof lies on the accused. From the statements, recorded by the Police in this case and from the surrounding circumstances of the case, I have come to the definite conclusion that the report of the police stating that the shot was fired by the accused in self-defence is true. As I have stated the statement of the police surgeon conclusively supports the conclusion. I have come to the conclusion that the statements of the four eye-witnesses brought by the complainant are false. These eye-witnesses are not credible witnesses. It will be harassment to the accused and waste of public time if any process is issued in this case".

Accordingly, he dismissed the complaint under section 203, Criminal Procedure Code.

Against this order of dismissal the respondent-complainant moved the High Court. The High Court set aside the order of dismissal and directed the learned Presidency Magistrate to issue process against the appellant and deal with the case in accordance with law, on a ground which the High Court expressed in the following words:

"Now, in the case before us, causing of the death of Sitaram being indisputable, if it was found as the petitioner alleges that it was the shot fired by the respondent that caused the death of Sitaram, the accused would have to establish the necessary ingredients of the right of private defence as laid down in section 96 and onwards of the Penal Code. We do not find anything in any of the sections in Chapter XVI to show that such an exception can be held to be established from the mere report of the police. That, in our view, is contrary to the provisions of section 105 of the Indian Evidence Act which are mandatory provisions. There is nothing in section 202 or section 203 of the Criminal Procedure Code which abrogates the rule as to the presumption laid down in section 105 of the Evidence Act and the mode of proof of exception laid down in imperative language in that section.

In these circumstances and for the reasons aforesaid, we find that this was not a case in which it was proper for the learned Magistrate to dismiss the complaint under section 203, there being no evidence before the learned Magistrate as and by way of proof to establish the exception of the right of private defence pleaded by the respondent".

The appellant then moved this Court and obtained Special Leave to appeal from the order of the High Court, dated September 13, 1957.

The short question before us is—was the High Court right in its view that when a Magistrate directs an enquiry under section 202, Criminal Procedure Code for ascertaining the truth or falsehood of a complaint and receives a report from the enquiring officer supporting a plea of self-defence made by the person complained against, it is not open to him to hold that the plea is correct on the basis of the report and the statements of witnesses recorded by the enquiring officer? Must he, as a matter of law, issue process in such a case and leave the person complained against to establish his plea of self-defence at the trial? It may be pointed out here that the High Court itself recognised that it would not be correct to lay down a proposition in absolute terms that whenever a defence under any of the exceptions in the Indian Penal Code is pleaded by the person complained against, the Magistrate would not be justified in dismissing the complaint and must issue process. Said the High Court:

"As we have already observed, if there is a complaint, which itself discloses a complete defence under any of the exceptions, it might be a case where a Magistrate would be justified in dismissing such a complaint finding that there was no sufficient ground to proceed with the case."

We are of the view that the High Court was in error in holding in this case that as a matter of law, it was not open to the learned Presidency Magistrate to come to the conclusion that on the materials before him no offence had been made out and there was no sufficient ground for proceeding further on the complaint.

The relevant sections bearing on the question are sections 200, 202 and 203.

"*Section* 200: A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided as follows:—

(*a*) ....

(*aa*) ....

(*b*) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and where the complaint is made in writing need not be reduced to writing, but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing;

(*c*) ....

Section 202 (1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint:

Provided that ....(*it is unnecessary to read the proviso*).

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police station, except that he shall not have power to arrest without warrant.

(2-A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

Section 203: The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath

(if any) of the complainant and the witnesses and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing".

The general scheme of the aforesaid sections is quite clear. Section 200 says *inter alia* what a Magistrate taking cognisance of an offence on complaint shall do on receipt of such a complaint. Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial. Section 203, be it noted, consists of two part; the first part indicates what are the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint. Section 204 says that if in the opinion of the Magistrate there is sufficient ground for proceeding, he shall take steps for the issue of necessary process.

Now, in the case before us it is not contended that the learned Presidency Magistrate failed to consider the materials which he had to consider, before passing his order under section 203, Criminal Procedure Code. As a matter of fact the learned Magistrate fully, fairly and impartially considered these materials. What is contended on behalf of the respondent-complainant is that as a matter of law it was not open to the learned Magistrate to accept the plea or right of self-defence at a stage when all that he had to determine was whether a process should issue or not against the appellant. We are unable to accept this contention as correct. It is manifestly clear from the provisions of section 203 that the judgment which the Magistrate has to form must be based on the statements of the complainant and his witnesses and the result of the investigation or inquiry. The section itself makes that clear, and it is not necessary to refer to authorities in support thereof. But the judgment which the Magistrate has to form is whether or not there is sufficient ground for proceeding. This does not mean that the Magistrate is bound to accept the result of the inquiry or investigation or that he must accept any plea that is set up on behalf of the person complained against. The Magistrate must apply his judicial mind to the materials on which he has to form his judgment. In arriving at his judgment he is not fettered in any way except by judicial considerations: he is not bound to accept what the inquiring officer says, nor is he precluded from accepting a plea based on an exception, provided always there are satisfactory and reliable materials on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not. If the Magistrate has not misdirected himself as to the scope of an enquiry under section 202 and has applied his mind judicially to the materials before him, we think that it would be erroneous in law to hold that a plea based on an exception can never be accepted by him in arriving at his judgment. What

bearing such a plea has on the case of the complainant and his witnesses, to what extent they are falsified by the evidence of other witnesses—all these are questions which must be answered with reference to the facts of each case. No universal rule can be laid in respect of such questions.

In support of its view the High Court has relied on some of its earlier decisions: *Emperor* v. *Dhondu Bapu Gujar*[1]; *Emperor* v. *J. F. Finan*[2]; and *Tulsidas Amanmal Karani* v. *S. F. Billimoria*[3]. We do not think that any of the aforesaid decisions lays down any such proposition in absolute terms as is contended for on behalf of the respondent. In *Emperor* v. *Dhondu Bapu Gujar*[1] a complaint charging defamation was dismissed by the Magistrate under section 203 without taking any evidence, on the ground that the accused was protected by section 499, *Exception* 8. It was held that the order of dismissal was bad. Patkar, J., significantly observed:

"If the Magistrate in this case had taken evidence on behalf of the prosecution and on behalf of the accused, and passed a proper order for discharge, the order of the District Magistrate ordering a further enquiry without giving reasons might have stood on a different footing. We do not think that, under the circumstances of this case, there are adequate grounds for interfering with the order of the District Magistrate."

In *Emperor* v. *J. A. Finan*[2], the accused did not dispute the correctness of the statements made by the complainant, but in justification pleaded the order passed by his superior officer and claimed protection under sections 76 and 79 of the Indian Penal Code. It is worthy of note that the order of the superior officer was not produced, but that officer very improperly wrote a letter to the Magistrate saying that he had given such an order. In these circumstances, the same learned Judge who decided the earlier case observed:

"It was, therefore, incumbent on the Magistrate to investigate the complaint and to find out whether the allegation of the accused that he was protected by sections 76 and 79 of the Indian Penal Code was made out by legal evidence before him".

The facts in *Tulsidas Amanmal Karani* v. *S. F. Billimoria*[3], were different, and the question there considered was whether a member of the Bar in India had absolute privilege. That decision has very little bearing on the question now before us.

Our attention has also been drawn to a decision of the Lahore High Court where the facts were somewhat similar: *Gulab Khan deceased through Karam Khan* v. *Gulam Muhammad Khan and others.*[4] In that case also the person complained against took the plea of self-defence, which was accepted. In the High Court an objection was taken to the procedure adopted and it was argued that the order of discharge should be set aside. In dealing with that argument Broadway, J., said:

"Now a Magistrate is empowered to hold an enquiry into a complaint of an offence in order to ascertain whether there is sufficient foundation for it to issue process against the person or persons complained against. In the present case the Magistrate clearly acted in the exercise of these powers under section 202, Criminal Procedure Code. He allowed the complainant to produce such evidence in support of his complaint as he wished to produce and after a consideration of that evidence came to the conclusion that that evidence was so wholly (un?) (*sic*) worthy of credence as to warrant his taking no further action in the matter".

Therefore, none of the aforesaid decisions lay down as an absolute proposition that a plea of self-defence can in no event be considered by the Magistrate in dealing with a complaint under the provisions of sections 200, 202 and 203, Criminal Procedure Code.

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1. 29 Bom.L.R. 713.
2. 33 Bom.L.R. 1182.
3. 34 Bom.L.R. 910.
4. A.I.R. 1927 Lah. 30.

On the facts, there is very little to be said. Learned Counsel for the State of Bombay supported the order of the learned Magistrate and pointed out that even on the narrow view taken by the High Court, a view to which he did not, however, subscribe, the learned Magistrate rightly held that there was no sufficient ground for proceeding; because the earlier version of some of the witnesses for the complainant itself showed that there was a riotous mob on the road which attacked cars, burnt a public bus, pelted stones, etc., which was quite inconsistent with their later version that Sitaram and his companions were quietly crossing the road and a shot was fired from a passing or moving car. There was overwhelming material to show that K. K. Shah's car was surrounded by the mob and some of the rioters tried to drag out and attack the appellant. K. K. Shah was one of the witnesses mentioned by the complainant and so also two of the Inspectors of Police. Their evidence clearly supported the plea of the appellant and in any case, showed that the witnesses examined on behalf of the respondent were totally unworthy of credence as to the circumstances in which the shots were fired. We cannot therefore say that the learned Magistrate was wrong in his judgment that there was no sufficient ground for proceeding further on the complaint.

We accordingly hold that the High Court set aside the order of the learned Magistrate on an erroneous view of the scope of section 203, Criminal Procedure Code. We allow the appeal, set aside the order of the High Court, dated September 13, 1957 and restore that of the learned Presidency Magistrate, dated April 30, 1957.

Appeal allowed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—S. J. IMAM, A. K. SARKAR AND RAGHUBAR DAYAL, JJ.

Padam Sen and another .. *Appellants**

v.

The State of Uttar Pradesh .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Scope—Court if has inherent power to appoint Commissioner except as provided in section 75 and Order 26—Commissioner appointed by Court without power to do so—If "public servant"—Offering bribe to him—If offence under section 165-A of the Penal Code (XLV of 1860), section 21, Penal Code—Scope.

The inherent powers under section 151 of the Civil Procedure Code are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well-recognised that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.

The inherent powers saved by section 151 are with respect to the procedure to be followed by the Court in deciding the cases, before it. These powers are not powers over the substantive rights which any litigant possesses.

A party has full rights over its books of account. The Court has no inherent power forcibly to seize its property. If it does so it invades the private rights of the party. Specific procedure is laid down in the Code for getting the relevant documents or books

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* Crl. A. No. 149 of 1958. 27th September, 1960.

in Court for the purpose of using them in Court. If a party does not produce the documents it is lawfully called upon to produces, the Court has the power to penalize it, in accordance with the provisions of the Code but it cannot get hold of the documents forcibly from the possession of the defaulting party.

Accordingly the Court has no inherent power to pass an order appointing a Commissioner to seize the plaintiff's account books on apprehension of the defendant that the plaintiff may fabricate the accounts. Such an order being null and void the person appointed as Commissioner is not a "public servant".

In the instant case there was neither an existing office of Commissioner, nor had the Court power to appoint the Commissioner for the purpose of seizing the plaintiff's account books and therefore *Explanation* 2 to section 21 of the Penal Code does not apply to the appointment and the person appointed cannot be held to be a public servant. Therefore the plaintiff did not commit any offence under section 165-A of the Penal Code by offering the person appointed Commissioner, money in order to have an opportunity to tamper with the books of account, in the custody of the person appointed as Commissioner.

Appeal from the Judgment and Order, dated the 27th October, 1958, of the Allahabad High Court in Criminal Appeal No. 1154 of 1956.

N. C. Chatterjee, Senior Advocate (*R. L. Kohli*, Advocate, with him), for Appellants.

G. N. Mathur and *C. P. Lal*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This is an appeal by Padam Sen and Shekhar Chand against the Order of the Allahabad High Court dismissing their appeal against the Order of the Special Judge, Meerut, convicting them of an offence under section 165-A of the Indian Penal Code. The High Court granted leave to appeal against its order.

One Genda Mal, father of Shekhar Chand, appellant No. 2, sued Mithan Lal and others in the Court of the Additional Munsif, Ghaziabad, for money on the basis of promissory notes executed by the defendants in his favour. The defendants apprehending that the plaintiff would fabricate his books of account with respect to payments made by them, applied for the seizure of the account books of the plaintiff. The Additional Munsif, by his order dated March 27, 1954, appointed Sri Raghubir Pershad, Vakil, Commissioner to seize those books of account. The Commissioner accordingly seized those books and brought them to Ghaziabad.

The appellants were convicted by the Special Judge under section 165-A of the Indian Penal Code for having offered bribe to the Commissioner for being allowed an opportunity to tamper with those books of account. Their conviction was upheld by the High Court.

The two Courts below have found that the appellants went to the Commissioner's Office on March 30, 1954, and offered him Rs. 900 as bribe. The appellants do not challenge these findings of fact recorded by the Courts below. Their only contention is that Sri Raghubir Pershad, the Commissioner, was not a public servant, and therefore even on the basis of the findings of fact arrived at by the Courts below, they did not commit any offence under section 165-A of the Indian Penal Code.

It has been contended for the appellants that the appointment of Sri Raghubir Pershad as Commissioner was null and void as the Additional Munsif had no power to appoint a Commissioner for the purpose of seizing the account books of the plaintiff on an application by the defendants, the power of a Civil Court to issue a Commission being limited by the provisions of section 75 and Order 26 of the Code of Civil Procedure (hereinafter called

the Code), and the Court having no inherent power to appoint a Commissioner for any purpose not mentioned in section 75 and Order 26 of the Code. On behalf of the State it is urged that the Court can appoint a Commissioner in the exercise of its inherent powers saved by section 151 of the Code for purposes which do not come within the provisions of section 75 and Order 26 of the Code.

It is further submitted for the State that even if the Additional Munsif had no power to appoint the Commissioner for seizing the books of account, Sri Raghubir Pershad would be deemed to be a public servant in view of *Explanation* 2 to section 21 of the Indian Penal Code because he was in actual possession of the situation of a public servant for he acted as Commissioner and was recognized as such by the appellants and others connected with the civil suit.

Section 75 of the Code empowers the Court to issue a commission, subject to conditions and limitations which may be prescribed, for four purposes, *viz.*, for examining any person, for making a local investigation, for examining or adjusting accounts and for making a partition. Order 26 lays down rules relating to the issue of commissions and allied matters. Mr. Chatterjee, learned counsel for the appellants, has submitted that the powers of a Court must be found within the four corners of the Code and that when the Code has expressly dealt with the subject-matter of commissions in section 75 the Court cannot invoke its inherent powers under section 151 and thereby add to its powers. On the other hand, it is submitted for the State, that the Code is not exhaustive and the Court in the exercise of its inherent powers, can adopt any proccedure not prohibited by the Code expressly or by necessary implication if the Court considers it necessary, for the ends of justice or to prevent abuse of the process of the Court.

Section 151 of the Code reads:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in section 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the proceedure expressly provided in the Code.

The question for determination is whether the impugned order of the Additional Munsif appointing Sri Raghubir Pershad, Commissioner for seizing the plaintiff's books of account can be said to be an order which is passed by the Court in the exercise of its inherent powers. The inherent powers saved by section 151 of the Code are with respect to the procedure to be followed by the Court in deciding the cause before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the Courts for passing such Orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure. A party has full rights over its books of account. The Court has no inherent power forcibly to seize its property. If it does so, it invades the private rights of the party. Specific procedure is laid down in the Code for getting the relevant documents or books in Court for the purpose of using them as evidence.

A party is free to produce such documents or books in support of its case as be relevant. A party can ask the help of the Court to have produced in Court by the other party such documents as it would like to be used in evidence and are admitted by that party to be in its possession. If a party does not produce the documents it is lawfully called upon to produce, the Court has the power to penalize it, in accordance with the provisions of the Code. The Court has the further power to draw any presumption against such a party who does not produce the relevant document in its possession, especially after it has been summoned from it. Even in such cases where the Court summons a document from a party, the Court has not been given any power to get hold of the document forcibly from the possession of the defaulting party.

The defendants had no rights to these account books. They could not lay any claim to them. They applied for the seizure of these books because they apprehended that the plaintiff might make such entries in those account books which could go against the case they were setting up in Court. The defendants' request really amounted to the Court's collecting documentary evidence which the defendants considered to be in their favour at that point of time. It is no business of the Court to collect evidence for a party or even to protect the rival party from the evil consequences of making forged entries in those account books. If the plaintiff does forge entries and uses forged entries as evidence in the case, the defendants would have ample opportunity to dispute those entries and to prove them forgeries.

We are therefore of opinion that the Additional Munsif had no inherent power to pass the order appointing a Commissioner to seize the plaintiff's account books. The order appointing Sri Raghubir Pershad as Commissioner for this purpose was therefore an order passed without jurisdiction and was therefore a null and void order.

Learned counsel for the State, Mr. Mathur, has submitted in the alternative that the impugned procedure adopted by the Additional Munsif comes within certain provisions of the Code and has referred to rule 5 of Order 38 and rules 1 (*b*) and 7 of Order 39 and rule 1 of Order 40 of the Code. We do not agree with this contention. The impugned order was not passed under any of these provisions. It was clearly an order which the Additional Munsif purported to pass in the exercise of the inherent powers of the Court. The order was:

"It is strange that an application of this kind has been made at this late stage, after over 2 years. However, in the interests of justice, issue commission to Sri Raghubir Pershad. He must go and recover Bahi Khatas for the year 1951 from the plaintiff and produce the same in Court. Fees Rs. 20, plus T. A. Report within six days. Costs of the commission will not be taxed."

Further, the provisions of rule 5 of Order 38 are to prevent a decree that may be passed being rendered infructuous and rule 1 (*b*) of Order 39 is applicable where the defendant threatens to dispose of his property to defraud creditors. None of these provisions has any application to the facts of the present case. Rule 7 of Order 39 empowers the Court, on the application of any party to a suit, to make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit or as to which any question may arise therein. The account books of the plaintiffs were not 'property' which were the subject-matter of the suit nor such that about them a question could arise in the suit. The account books could, at best, have been piece of evidence, if the plaintiff or the defendant had cared to rely on them. We therefore hold that the Additional Munsif had no power under the Code to appoint the Commissioner for seizing the plaintiff's books of account.

Lastly it was urged for the State that even if the appointment of Sri Raghubir Pershad as Commissioner was null and void as the Additional Munsif had no jurisdiction to appoint a Commissioner for seizing the account books of the plaintiff, Sri Raghubir Pershad should be treated to be a 'public servant' in view of *Explanation* 2 to section 21 of the Indian Penal Code. It has not been disputed for the appellant that if the appointment of Sri Raghubir Pershad as Commissioner had been valid, he would have been a public servant in view of the Fourth Clause to section 21 of the Indian Penal Code. *Explanation* 2 to section 21 reads:

"Wherever the words 'public servant' occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation."

The contention for the State is that though there was a legal defect in Sri Raghubir Pershad's appointment as Commissioner on account of the Additional Munsif having no power to appoint a Commissioner for the purpose of seizing the plaintiff's books of account, that will not affect his being a public servant as he was in actual possession of the situation of a public servant. We do not agree with this contention, and are of opinion that the *Explanation* applies only when there be a post in existence. The *Explanation* does not apply when there is no pre-existing post or when the person appointing has no authority to appoint.

The word "situation" according to Webster's New International Dictionary of the English Language, means: position or place of employment, place, office; as a situation in a store. The apposite meaning for the purposes of this *Explanation* would be 'office'. 'Office' again, according to the same Dictionary, means a special duty, trust, charge or position, conferred by an exercise of governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging; as, an executive or judicial office .... In a wider sense, any position or place in the employment of the Government, especially one of trust or authority. The Dictionary further notes the differences in the connotations of the various words office, post, appointment, situation and place and says: Office commonly suggests a position of (especially public) trust or authority; and situation emphasizes the idea of employment, especially in a subordinate position; as, to seek a situation as governess, as private secretary.

It is therefore clear that it is necessary for the application of this *Explanation* that the person concerned should be in actual possession of the pre-existing office of a public servant. If there be no office or post, there could be no question of any person's being in actual possession thereof, and of the person concerned coming within the terms of this *Explanation*. There was no post or office of a Commissioner in existence. All that happened here was that Sri Raghubir Pershad was authorized to seize and keep certain documents in his possession. In the present case there was neither any existing office of Commissioner, nor the Additional Munsif had power to appoint Sri Raghubir Pershad as Commissioner for the purpose of seizing the plaintiff's account books and therefore this *Explanation* does not apply to the appointment of Sri Raghubir Pershad as Commissioner. It follows, therefore, that Sri Raghubir Pershad cannot be held to be a public servant.

We therefore accept the contention for the appellants and hold that Sri Raghubir Pershad was not a public servant and that therefore the appellants did not commit any offence under section 165-A of the Indian Penal Code by their offering him money in order to have an opportunity to tamper with the

books of account which were in his custody. We therefore allow the appeal, set aside the order of the Court below and acquit the appellants of the offence under section 165-A and direct that the fine, if paid, be refunded. The appellants are on bail and therefore the bail bonds will be cancelled.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Commissioner of Income-tax, Bihar and Orissa .. *Appellant**

v.

Maharaja Pratapsingh Bahadur of Gidhaur .. *Respondent.*

Income-tax Act (XI of 1922), section 34—(Amended by Act XLVIII of 1948)—Retrospective effect.

Section 34 of the Income-tax Act prior to the Amendment Act (XLVIII of 1948), did not lay any duty upon the Income-tax Officer to seek the approval of the Commissioner before issuing a notice under section 34. The Amending Act by its first section made the amendments retrospective and made them "deemed to have come into force on 30th day of March, 1948". This indicates a different intention which excludes the operation of section 6 of the General Clauses Act. Where the notices under section 34 of the Income-tax Act were issued on 8th August, 1948, when the amended provision requiring prior approval of the Commissioner must be deemed to be an existing enactment, the notices issued without such prior approval are invalid.

Appeal from the Judgment, dated the 13th July, 1956, of the Patna High Court in Miscellaneous Judicial Case No. 665 of 1954.•

R. Ganapathy Iyer and *R. H. Dhebar,* Advocates, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, *R. C. Prasad,* Advocate, with him, for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by the Commissioner of Income-tax with a certificate against the Judgment and Order of the High Court at Patna answering two questions of law referred to it under section 66 (1) of the Income-tax Act by the Tribunal, in the negative. These questions were:

"(1) Whether in the circumstances of the case assessment proceedings were validly initiated under section 34 of the Indian Income-tax Act?

(2) If so, whether in the circumstances of the case the amount received from interest on arrears of agricultural rent was rightly included in the income of the assessee?"

The assessee, the Maharaja Pratapsingh Bahadur of Gidhaur, had agricultural income from his zamindari for the four assessment years, 1944-45 to 1947-48. In assessing his income to income-tax, the authorities did not include in his assessable income interest received by him on arrears of rent. This was presumably so in view of the decision of the Patna High Court. When the Privy Council reversed the view of law taken by the Patna High Court in *Commissioner of Income-tax* v. *Kamakshya Narayan Singh,*[1] the Income-tax Officer issued notices under section 34 of the Indian Income-tax Act for assessing the escaped income. These notices were issued on August 8, 1948. The assessments after the returns were filed, were completed on August 26, 1948. Before the notices were issued, the Income-tax Officer had not put the matter before the

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*C. A. No. 650 of 1957. 29th November, 1960.

1. (1948) 2 M.L.J. 447: L.R. 75 I.A. 283 : (1948) 16 I.T.R. 325 : A.I.R. 1949 P.C. 1 (P.C.).

Commissioner for his approval, as the section then did not require it, and the assessments were completed on those notices. Section 34 was amended by the Income-tax and Business Profits Tax (Amendment) Act, 1948 (No. 48 of 1948), which received the assent of the Governor-General on September 8, 1948. The appeals filed by the assessee were disposed of on September 14 and 15, 1951, by the Appellate Assistant Commissioner, before whom no question as regards the validity of the notices under section 34 was raised. The question of the validity of the notices without the approval of the Commissioner appears to have been raised before the Tribunal for the first time. In that appeal, the Accountant Member and the Judicial Member differed, one holding that the notices were invalid and the other, to the contrary. The President agreed with the Accountant Member that the notices were invalid, and the assessments were ordered to be set aside.

The Tribunal then stated a case and raised and referred the two questions, which have been quoted above. The High Court agreed with the conclusions of the majority, and the present appeal has been filed on a certificate granted by the High Court.

Section 34, as it stood prior to the Amendment Act No. 48 of 1948, did not lay any duty upon the Income-tax Officer to seek the approval of the Commissioner before issuing a notice under section 34. The amending Act by its first section made sections 3 to 12 of the amending Act retrospective by providing "sections 3 to 12 shall be deemed to have come into force on the 30th day of March, 1948...." Section 8 of the amending Act substituted a new section in place of section 34, and in addition to textual changes with which we are not concerned, also added a proviso to the following effect:

"Provided that—

(1) the Income-tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons that it is a fit case for the issue of such notice."

The question is whether the notices which were issued were rendered void by the operation of this proviso. The Commissioner contends that section 6 of the General Clauses Act, particularly clauses (*b*) and (*c*) saved the assessments as well as the notices. He relies upon a decision of the Privy Council in *Lemm* v. *Mitchel*,[1] *Eyre* v. *Wynn-Mackenzie*[2] and *Butcher* v. *Henderson*[3] in support of his proposition. The last two cases have no bearing upon this matter; but strong reliance is placed upon the Privy Council case. In that case, the earlier action which had been commenced when the Ordinance had abrogated the right of action for criminal conversation, had already ended in favour of the defendant and no appeal therefrom was pending, and it was held that the revival of the right of action for criminal conversation did not invest the plaintiff with a right to begin an action again and thus expose the defendant to a double jeopardy for the same act, unless the statute expressly and by definite words gave him that right. The Privy Council case is thus entirely different.

No doubt, under section 6 of the General Clauses Act it is provided that where any Act repeals any enactment, then unless a different intention appears, the repeal shall not affect the previous operation of any enactment so repealed or anything duly done thereunder or affect any right, obligation or liability acquired, accrued or incurred under any enactment so repealed. It further provides that any legal proceedings may be continued or enforced as if the repealing Act had not been passed. Now, if the amending Act had re-

1. L.R. 1912 A.C. 400.
2. (1896) 1 Ch. 135.
3. (1868) L.R. 3 Q.B. 335.

pealed the original section 34, and merely enacted a new section in its place, the repeal might not have affected the operation of the original section by virtue of section 6. But the amending Act goes further than this. It repeals the original section 34, not from the day on which the Act received the assent of the Governor-General but from a stated day, *viz.*, March 30, 1948, and substitutes in its place another section containing the proviso above mentioned. The amending Act provides that the amending section shall be deemed to have come into force on March 30, 1948, and thus by this retrospectivity, indicates a different intention which excludes the application of section 6. It is to be noticed that the notices were all issued on August 8, 1948, when on the statute book must be deemed to be existing an enactment enjoining a duty upon the Income-tax Officer to obtain prior approval of the Commissioner, and unless that approval was obtained, the notices could not be issued. The notices were thus invalid. The principle yhich was applied by this Court in *Venkatachalam* v. *Bombay Dyeing Manufacturing Co., Ltd.,*[1] is equally applicable here.

No question of law was raised before us, as it could not be in view of the decision of this Court in *Narayana Chetty* v. *Income-tax Officer,*[2] that the proviso was not mandatory in character. Indeed, there was time enough for fresh notices to have been issued, and we fail to see why the old notices were not recalled and fresh ones issued.

For these reasons, we are in agreement with the High Court in the answers given, and dismiss this appeal with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Messrs. Ramnarain Sons (Pr.) Ltd. .. *Appellant**

v.

The Commissioner of Income-tax, Bombay .. *Respondent.*

Income-tax Act (XI of 1922)—Assessee-company formed for carrying on business as brokers, managing agents and dealers in shares and securities—Assessee acquiring controlling shares in a company (at very much above market rate) to enable it to acquire managing agency of that company—Loss incurred in re-selling such shares — Managing agency—If capital asset—Loss in sale of the shares—If business loss.

Where the assessee a company formed for carrying on business as brokers, managing agents and dealers in shares and securities, purchased a large number of shares in a company (at very much above the market rate) to enable it to acquire the managing agency of that company and subsequently sustained loss on the sale of those shares:

Held: The acquisition of the managing agency was an acquisition of a capital asset and the loss incurred by sale of the shares was of a capital nature. The acquisition of those shares at prices which exceeded very much the current market rate, was not acquisition of a stock in trade, but of a capital asset. The managing agency and the shares did not constitute stock in trade of a trading venture.

Appeal by Special Leave from the Judgment and Order, dated the 2nd August, 1956, of the Bombay High Court in Income-tax Reference No. 1 of 1956.

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1. (1958) S.C.J. 1054 : (1958) 2 M.L.J. (S.C.) 882 : (1958) 2 An.W.R. (S.C.) 182 : (1958) S.C.R. 703.

2. (1959) S.C.J. 250 : (1959) 1 M.L.J. (S.C.) 109 : (1959) 1 An.W.R. (S.C.) 109 : (1959) 35 I.T.R. 388.

*C.A. No. 698 of 1957. 5th December, 1960.

A. V. Viswanatha Sastri, Senior Advocate (*B. A. Palkhiwala,* and *G. Gopalakrishnan,* Advocates, of *Messrs. Gagrat & Co.,* with him), for Appellant.

Hardyal Hardy and *D. Gupta,* Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The High Court of Judicature at Bombay answered the following two questions referred by the Income-tax Appellate Tribunal, Bench "B", Bombay, under section 66 (1) of the Indian Income-tax Act, 1922:

(1) Whether the acquisition of the managing agency of the Dawn Mills Co., Ltd., was in the nature of a 'business' carried on by the assessee-company?

(2) If the answer to the first question is in the affirmative, whether the loss suffered by the assessee-company of Rs. 1,78,438 on purchase and sale of 400 shares of the Dawn Mills Co., Ltd., being incidental to its business of acquiring the managing agency, was a loss of a revenue nature?,

as follows:

(1) Acquisition of the managing agency was an acquisition of a capital asset;

(2) The loss in respect of the 400 shares was of a capital nature.

Against the order of the High Court, this appeal is preferred with Special Leave.

The appellants are a private limited company registered under the Indian Companies Act, 1913, and carry on business as brokers, managing agents and dealers in shares and securities. One of the objects for which the appellants were incorporated was to acquire managing agencies. The appellants also carried on business in shares of different companies, and were assessed to Income-tax as dealers in shares and securities.

Messrs. Sassoon J. David & Co., Ltd. were the managing agents of the Dawn Mills Ltd.—a public limited company—and they held 2,507 out of a total issue of 3,200 shares. On September 28, 1946, the appelants purchased from Messrs. Sasoon, J. David & Co., Ltd., 1,507 shares of the Dawn Mills at the rate of Rs. 2,321-8-0 per share and having obtained a controlling voting right, acquired the managing agency rights of the Mills. The remaining one thousand shares were acquired from Messrs. Sassoon J. David & Co., Ltd. by the Directors of the appellants at the rate of Rs. 1,500. At the material time, the ruling market price of the shares of the Dawn Mills was Rs. 1,610. In December, 1946, the appellants sold 400 out of the shares purchased by them, and thereby suffered a loss of Rs. 1,78,438. The loss suffered by the appellants in the year of account January 1, 1946, to December 31, 1946, by sale of shares including 400 shares of the Dawn Mills was Rs. 1,92,834. Crediting Rs. 1,05,907 earned as profit in certain other share transactions, the net loss suffered in the share transactions in the year of account amounted to Rs. 86,927. The appellants valued their shares at the end of the year of account at cost or market price whichever was lower. By this method of valuation, the books of account of the appellants showed a loss of Rs. 7,97,792 which included a loss of Rs. 7,04,000 on the valuation of the Dawn Mills shares held by the appellants at the end of the year of account.

In the Income-tax assessment for the year 1947-48, the appellants claimed Rs. 86,927 as loss on sales in trade in shares and Rs. 7,97,792 as loss on valuation of stock-in-trade. The Income-tax Officer, Companies' Circle III, (I), Bombay, disallowed the loss suffered by the appellants in the sale of the Dawn Mills shares because in his view those shares were purchased by way of capital investment and the loss suffered by sale thereof could not be allowed as a trad-

ing loss. He also held that the appellants were not entitled to depart from the method adopted in earlier years and to value the closing stock of shares in the year of account at cost or market price whichever was lower and to claim the difference between the opening and closing valuation as a trading loss. The Appellate Assistant Commissioner confirmed that order. In appeal, the Income-tax Appellate Tribunal held that the managing agency of the Dawn Mills was acquired by the appellants as a part of their business activity and the shares of the Mills having been purchased in the regular course incidental to their business of acquiring the managing agency the loss on the sale of those shares was allowable as a revenue loss; but the shares of the Dawn Mills were not the stock-in-trade of the appellants' business and they were not entitled to treat the difference between the purchase price and the value at close of the year of those shares, as a trading loss. Accordingly, the Tribunal allowed Rs. 1,78,438 as loss on sale of 400 shares of the Dawn Mills, but did not allow Rs. 7,04.000 as loss arising out of the valuation of the Dawn Mills shares at the end of the year of account. On the application of the Commissioner of Income-tax, the Tribunal referred to the High Court the questions set out hereinbefore. In the High Court, the appellants took out a notice of motion for directing the Tribunal to refer certain questions which the appellants claimed arose out of the order of the Tribunal and which the Tribunal did not refer.

The High Court agreed with the opinion of the Tribunal that the shares of the Dawn Mills were not the stock-in-trade of the appellants and that those shares were purchased by the appellants with the object of acquiring the managing agency. The High Court, however, held that the shares acquired by the appellants formed a capital asset and the loss suffered by sale of 400 out of those shares in the year of account being a capital loss, was not in the computation of income a permissible deduction. The High Court dismissed the notice of motion taken out by the appellants.

In considering whether a transaction is or is not an adventure in the nature of trade, the problem must be approached in the light of the intention of the assessee having regard to the "legal requirements which are associated with the concept of trade or business." The inference on this question raised by the Tribunal on the facts found is of mixed law and fact and is open to challenge before the High Court on a reference under section 66 of the Income-tax Act—*G. Venkataswami Naidu & Co.* v. *The Commissioner of Income-tax.*[1] It was held in *The Oriental Investment Co., Ltd.* v. *The Commissioner of Income-tax, Bombay,*[2] that the question whether the appellants' transactions amounted to dealing in shares and properties or to investment, is a mixed question of law and fact, and that the legal effect of the facts found by the Tribunal on which the assessee could be treated as a dealer or an investor, is a question of law. The Tribunal held that the shares of the Dawn Mills purchased by the appellants did not become their stock-in-trade. But they held that the transaction having been effected in the regular course of the business of the appellants, *viz.*, the acquisition of managing agencies, the loss resulting from the sale of shares was incidental to that business and was a revenue loss. It is not easy to appreciate the process by which this conclusion was reached. The shares were purchased for the purpose of acquiring the managing agency of the Dawn Mills; they were not purchased in the course of the appellants' business as dealers in shares. By purchasing the shares which facilitated acquisition of the managing agency, a capital asset was acquired and merely because the managing agency could be utilised for earning profit, the acquisi-

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1. (1959) S.C.J. 730: (1959) 2 M.L.J. (S.C.) 31: (1959) 2 An.W.R. (S.C.) 31: (1959) 1 S.C.R. (Suppl.) 646.

2. (1958) S.C.J. 37: (1958) 1 M.L.J. (S.C.) 18: (1958) 1 An.W.R. (S.C.) 18: (1958) S.C.R. 49.

tion of the shares which led to the acquisition of the managing agency could not, in the absence of an intention to trade in those shares, be regarded as acquisition of stock-in-trade of the share business. The appellants had undoubtedly purchased the shares of the Dawn Mills with money borrowed at interest, but that circumstance by itself does not evidence an intention to trade in the shares. Nor is the fact that the appellants are dealers in shares and their Memorandum of Association authorises them to carry on business in shares of any importance in the circumstances of this case. The appellants by entering the shares of the Dawn Mills in their statement of shares in which trading transactions were carried on could not alter the real character of the acquisition. The appellants were undoubtedly dealers in shares; but the transaction in the Dawn Mills shares was *ex facie* not a business transaction. The current market rate at the date of purchase was Rs. 1,610 per share whereas the appellants acquired the shares at the rate of Rs. 2,321-8-0 per share. Even assuming that the appellants acquired the entire block of 2,507 shares from Messrs. Sasson, J. David & Co., Ltd.—the shares transferred to the names of the Directors being held by them merely as nominees of the appellants—the price per share was considerably in excess of the prevailing market rate. The only reason for entering into the transaction which could not otherwise be regarded as a prudent business transaction, was the acquisition of the managing agency. If the purpose of the acquisition of a large block of shares at a price which exceeded the current market price by a million rupees was the acquisition of the managing agency, the inference is inevitable that intention in purchasing shares was not to acquire them as part of the trade of the appellants in shares. The Tribunal found that the Dawn Mills' shares were acquired by the appellants for obtaining the managing agency of the Mills. The agency was acquired by virtue of the voting power which the appellants obtained having purchased a very large block of shares, and for acquiring the managing agency, the appellants did not pay any distinct consideration. The managing agency is manifestly the source of profit of the appellants; but the shares purchased and the managing agency acquired were both assets of a capital nature and did not constitute stock-in-trade of a trading venture. If the shares were acquired for obtaining control over the managing agency of the Dawn Mills, the fact that the acquisition of the shares was integrated with the acquisition of the managing agency did not affect the character of the acquisition of the shares. Subsequent disposal of some out of the shares by the appellants could also not convert what was a capital acquisition into an acquisition in the nature of trade.

The High Court was therefore right in holding that the acquisition of the managing agency was an acquisition of a captital asset and the loss incurred by sale of the 400 shares was of a capital nature. The High Court was also right in dismissing the notice of motion for an order directing the Tribunal to refer the questions suggested by the appellants. If the acquisition of the shares was not acquisition of a stock-in-trade, but of a capital asset, the appellants, by valuing the shares at cost or market price whichever was lower, could not bring the difference between the purchase price and the valuation made by them into their trading account.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Commissioner of Excess Profits Tax, Madras .. *Appellant**

v.

N. M. Rayaloo Iyer & Sons .. *Respondent.*

Excess Profits Tax Act (XV of 1940), Schedule I, rule 12 and Income-tax Act (XI of 1922), section 10 (2) (xv) and 10 (2) (x)—Commission payable out of 'net profits' to assessee's employees—Excess profits tax if to be deducted in computing net profits—Finding of Tribunal as to reasonableness and necessity of expenses deducted—Interference by High Court on reference—When permissible.

Whether in determining the commission payable to employees of assessee at a percentage of profits the Excess Profits Tax is to be deducted from the profits is a question of interpretation of the agreement where under the agreement the employee was to receive 12½ per cent. commission on the net profits calculated after deducting from the gross profits of the business the salaries, wages and other outgoings; in the expression 'outgoings' is the Excess Profits Tax paid by the assessee included and can be deducted?

Commission paid to various employees in the instant case is not a permissible deduction under Excess Profits Tax Act. It is the province of the Excess Profit Tax Officer and the Tribunal to assess the permissible deductions in the context of reasonableness and necessity having regard to the requirements of the business and interference with the conclusion is permissible if the view of the Taxing Authorities is vitiated by an error of law or is not based on any materials, or the conclusion is such that no man instructed in law could have arrived at. It is true that in considering whether the deduction claimed by the assessee for payments made as bonus or commission paid to an employee is to be allowed, the Taxing Officer must have regard to the provisions of section 10 (2) (*x*) of the Income-tax Act and clause (12) of Schedule I of the Excess Profits Tax Act; and in assessing reasonableness, consideration of commercial expediency must undoubtedly be taken into account. But commercial expediency must be viewed in the light of the requirements of the business and the actual services rendered by the persons concerned. Any abstract consideration of commercial expediency is out of place.

In the instant case the High Court was not justified in seeking to re-appreciate the evidence on which the conclusion of the Excess Profit Tax Officer which was confirmed by the Tribunal was based. Their jurisdiction being advisory the High Court had to answer the questions, submitted for opinion on the facts found; if the High Court held the view that the Taxing Authorities had misdirected themselves in law or had made a wrong inference in law or had failed to apply the correct tests or had misconceived the evidence, it was open to them to invite the attention of Taxing Authorities to the error committed by them; but the High Court could not set aside the decision of the Taxing Authorities on a re-appreciation of the evidence.

Appeals from the Judgment and Order, dated the 18th April, 1955, of the Madras High Court in Case Referred Nos. 53 of 1952 and 44 of 1953.

Hardyal Hardy and *D. Gupta*, Advocates, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (*R. Ganapathy Iyer* and *S. Padmanabhan*, Advocates and *G. Gopalakrishnan*, Advocate of *Messrs. Gargat & Co.*, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—These are two appeals filed with certificate of fitness granted by the High Court of Judicature at Madras. Appeal No. 494 of 1958 arises out of orders passed in certain Excess Profits Tax Appeals and Appeal No. 495 of 1958 arises out of orders passed in certain Income-tax References, Excess Profits Tax Appeals and Business Profits Tax Appeals.

Messrs. N. M. Rayaloo Iyer & Sons—hereinafter referred to as the assessees—are a firm carrying on business principally in dyes and chemicals. They are

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*C.A. Nos. 494 and 495 of 1958. 8th December, 1960.

the chief representatives in "South India" of the products of the Imperial Chemical Industries Company (India) Ltd.—hereinafter referred to as the "I.C.I." The business in dyes and chemicals was in the years material to these appeals, conducted in the name and style of "Colours Trading Company", with its Head Office at Madura and in thirteen branch offices in different towns in "South India". The business was carried on originally in partnership by three brothers, N. M. R. Venkatakrishna Iyer, N. M. R. Subbaraman and N. M. R. Krishnamurti. On April 13, 1946, N. M. R. Subbaraman retired from the firm and the share of N. M. R. Venkatakrishna Iyer was taken over by a private limited company N. M. R. Venkatakrishna Iyer & Sons Ltd., but the business was, notwithstanding the changes in the personnel, continued in the original name and style. One N. M. R. Mahadevan (son of N. M. R. Venkatakrishna Iyer)—hereinafter referred to as Mahadevan—was employed by the assessees as the General Manager of the Colours Trading Co. by letter, dated April 17, 1940, the assessees wrote to Mahadevan agreeing to pay him remuneration at the rate of Rs. 1,800 per annum and 5 per cent. of the net profits of the concern (Colours Trading Company) calculated by deducting from the gross profits of the business, salaries, wages and other outgoings but without making any deduction for capital. By lettter, dated March 30, 1943, the salary of Mahadevan was fixed at Rs. 3,000 per annum and the commission was enhanced to 12½ per cent. of the net profits of the Colours Trading Company. The branch offices were managed by local managers and assistant managers who were paid in addition to monthly salary, annual and special bonus and dearness allowance. The assessees received from the I.C.I. commission at rates varying between 7½ per cent. and 12 per cent. on different products sold to them. With effect from April 1, 1944, the I.C.I. allowed a special emergency commission of 5 per cent. on all dyes and dye-stuffs sold to the assessees. This special emergency commission was increased to 15 per cent. on all sales on or after March 1, 1945, but was subsequently reduced to 10 per cent. on sales on and after September 1, 1946.

These appeals relate to the liability of the assessees to Excess Profits Tax for the chargeable accounting periods ending April 13, 1943, April 12, 1944, April 12, 1945, and March 31, 1946, and for Business Profits Tax for the chargeable accounting periods ending April 12, 1946, March 31, 1947, April 13, 1947, March 31, 1948, and April 12, 1948.

The assessees claimed that they had paid to their employees in the years of account 1942-43 to 1947-48 under agreements executed from time to time a share in the special emergency commission received from the I. C. I., in addition to monthly salary, dearness allowance and general and special bonus. The I.C.I. in allowing the emergency commission by its letter dated January 24, 1944, recommended that 1 per cent. out of the 5 per cent. commission allowed may be "passed on" by the assessee to their "sub-distributors". The assessees claimed that pursuant to this recommendation, they paid to their employees commission at rates varying between 1½% to 4%, and when the emergency commission was increased to 15% and the I.C.I., by letter dated February 23, 1945, recommended that 6% out of this commission may be passed on to the sub-distributors, the assessees claimed to have distributed commission at rates varying from 2% to 7½% and in some cases at a rate as high as 12%. Under the service agreements, commission was payable to the employees only if the turnover in dyes exceeded Rs. 1,00,000 net in any year, but to empoyees in several branches the assessees claimed to have paid commission at generous rates even when the turnover fell far short of that amount. In the year of account ending April 12, 1945, there was a revision of the scales of salaries of the employees, and the assessees commenced

giving to their employees dearness allowance and special bonus which in the aggregate exceeded 50% of the basic annual salary and also annual bonus equal to the annual salary. The result of this revision of emoluments was that each employee received an amount equal to at least 2½ times his enhanced basic salary. In addition to this remuneration, the assessees claimed that they had paid a share in the commission which in some cases exceeded 12 times the basic salary.

In computing the total income of the assessees for years 1943-44 and 1944-45 for purposes of income-tax, the Income-tax Officer disallowed the payment of 12½% of the net profits of the Colours Trading Co. to Mahadevan and in computing the income for the assessment years 1945-46, 1946-47, 1947-48 and 1948-49 the Income-tax Officer disallowed the commission paid to the Branch Managers and other employees. In appeal the Appellate Assistant Commissioner set aside the order which disallowed the amount of commission paid to Mahadevan and following the order of the Income-tax Appellate Tribunal in certain Excess Profits Tax appeals, allowed 5% of the net profits without deduction of Excess Profits Tax or Business Profits Tax, or 12½% after deduction of Excess Profits Tax or Business Profits Tax whichever was higher. That order was confirmed in appeal by the Income-tax Appellate Tribunal. The Tribunal also confirmed the order disallowing the emergency commission paid to the branch managers and other employees, and in the computation of taxable income for purposes of Income-tax, Excess Profits Tax and Business Profits Tax, added back all those payments. At the instance of the assessees, the Tribunal referred two sets of questions to the High Court under section 66 (1) of the Income-tax Act read with section 21 of the Excess Profits-tax Act.

Questions 1 to 3 in Referred Case No. 44 of 1953 were:

(1) Whether in allowing a deduction under section 10 (2) (*xv*) of the Income-tax Act, the Income-tax Officer is precluded from going into the question whether the amount was paid wholly and exclusively for the purpose of the assessee's business?

(2) Whether there was any material before the Tribunal to hold that the commission payment to N. M. R. Mahadevan at 12½% before deduction of Excess Profits Tax or Business Profits Tax was not wholly and exclusively laid out for the purpose of the assessee's business?

(3) Whether the commission payment to the branch managers, assistant managers and other employees is an expenditure laid out wholly and exclusively for the purpose of the business?

Questions referred in Referred Case No. 53 of 1952 were:

(1) Whether the Appellate Tribunal erred in law in holding that in accordance with the terms of letters, dated 17th April, 1940, and 30th March, 1943; and the conduct of the parties the Excess Profits Tax payable by the assessee should be deducted from the profits before the commission of 12½% payable to N. M. R. Mahadevan is calculated?

(2) Whether there is any material on evidence sufficient in law for the Appellate Tribunal to hold that the commission of 12½% on profits paid to Mahadevan was unreasonable within the meaning of rule 12 of Schedule I of the Excess Profits Tax Act?

(3) Whether on the facts and circumstances of the case the disallowance by the Excess Profits Tax authorities of the commission paid to branch managers is justified under rule 12 of Schedule I of the Excess Profits Tax Act?

The material provisions relating to allowances under the Excess Profits Tax Act and the Business Profits Tax Act (which Act superseded the Excess Profits Tax Act as from March 30, 1946) were on the questions arising in this case substantially the same and hereafter reference to the Excess Profits Tax Act will in respect of the period after March 30, 1946, be deemed to be a reference to the Business Profits Tax Act.

In the opinion of the High Court, in computing the taxable income, the deductions claimed by the assessees fell to be considered not under section 10 (2) (*xv*) of Income-tax Act but properly under section 10 (2) (*x*) of the Income-tax Act, the latter being a specific provision in the Act relating to deduction of commission or bonus paid to an employee. The High Court observed that in assessing liability to Excess Profits Tax the bonus or commission paid to the employees of the tax payer may be permitted as a deduction in the light of section 10 (2) (*x*) of the Income-tax Act and Rule 12 of Schedule 1 to the Excess Profits Tax Act. The case of Mahadevan, according to the High Court, did not present much difficulty, the only question which fell to be determined in his case being whether in allowing deduction of commission at the rate of 12½% on the net profits, the Excess Profits Tax paid by the assessees was to be taken into account. Following a judgment of the Punjab High Court in *Commissioner of Income-tax, Delhi* v. *Delhi Flour Mills, Ltd.,*[1] the High Court observed that in computing net profits Excess Profits Tax could not be deducted, but on the materials on the record, the question whether the commission paid to the branch managers and other employees was properly deductible could not be decided, and accordingly the High Court called for and obtained from the Tribunal a supplementary statement of facts. The High Court after considering the supplementary statement observed that the assessees had undoubtedly distributed substantial sums out of the emergency commission to its managers and assistant managers in the branches at rates well above the minima recommended by the I. C. I., but the distribution was at rates within the percentages allowed by the I.C.I. as additional commission and the balance retained by the appellants out of the emergency commission was also substantial. In the view of the High Court, the Tribunal had to consider three factors, (1) the reasonableness of the commission in the light of the conditions laid down in section 10 (2) (*x*), (2) the reasonableness of the percentages above the minima suggested by the I.C.I., and (3) the need for maintaining the reputation of the I.C.I., and the distributor in conditions that prevailed during that period when "black-marketting was rampant", but observed the High Court

"the Tribunal had made no real attempt to analyse the evidence before it to justify its conclusion that only the minima recommended by the I.C.I. and nothing in excess satisfied the test of reasonableness under rule 12, Schedule I, of the Excess Profits Tax Act".

They then observed that, whether the test of reasonableness is that prescribed by section 10 (2) (*x*) of the Income-tax Act or whether reasonableness has to be judged in the light of commercial expediency under rule 12, Schedule 1, of the Excess Profits Tax Act, the expenditure was to be judged from the point of view of a businessman and not by the application of any subjective standard of a taxing officer and that on an analysis of the materials furnished, they were unable to see anything *per se* unreasonable in the amounts of commission actually paid by the assessees to the branch managers and assistant managers in the branches. The High Court also observed that the minima recommended by the I.C.I. did not provide the only or an absolute standard for judging the reasonableness of the payments made, and stated:

"No doubt, the employees of the assessee were in receipt of regular salaries and bonuses. But then, a sub-distributor if he had not been paid a salary, would have had to be paid a share of the basic commission itself. What the assessee got in the years in question was in the nature of a windfall. It shared it with its employees. It had been instructed to share it. The emergency commission was allowed by the Imperial Chemical Industries so that the distributors could maintain the reputation of the Imperial

1. (1953) 23 I.T.R. 167.

Chemical Industries in the market even under the disturbed conditions that prevailed in those years. If, to maintain that reputation and to maintain its own, the assessee paid to its employees even on a liberal basis, a share of that emergency commission, it is a little difficult to hold that, while receipt of the emergency commission was reasonable, sharing it beyond a particular point would *per se* be unreasonable, in the sense that no prudent businessman in that line of business, in those years, and in the market condition that prevailed then, with ample scope for black-marketting, would have paid out commission on such a basis".

They then concluded:

"Though, of course, it was for the assessee to show that it was entitled to the deduction claimed under section 10 (2) (*x*) of the Income Tax Act and rule 12 of Schedule I of the Excess Profits Tax Act, there was really no basis on record to show that judged from the point of view of a businessman, payments in excess of the minima recommended by the Imperial Chemical Industries were not reasonable. We are of opinion that the entire claim should have been allowed both under section 10 (2) (*x*) of the Income-tax Act and under rule 12 of Schedule I of the Excess Profits Tax Act on the ground that the statutory requirements were satisfied by the assessee."

The High Court accordingly answered the questions about the disallowance of commission paid to the employees of the assessees being justified under rule 12, Schedule 1, of the Excess Profits Tax Act in the negative. Against those orders, these two appeals have been preferred with certificates of fitness from the High Court.

The first question which falls to be considered is whether in the computation of taxable income for purposes of Income-tax and Excess Profits Tax, commission allowed to Mahadevan at 12½ per cent. should be allowed after deducting the Excess Profits Tax paid. By the agreement, dated April 17, 1940, as modified by the agreement, dated March 30, 1943, Mahadevan was to be paid remuneration at the rate of Rs. 3,000 per annum and 12½ per cent. of the net profits of the Colours Trading Company. In the view of the High Court in determining the "net profits" under the agreement "in accordance with the principles of commercial accountancy and the principles laid down under the Excess Profits Tax Act" the Excess Profits Tax which is a tax on profits could not be deducted. In our judgment the question is one of the true interpretation of the agreement. Mahadevan was under the agreement to receive 12½ per cent. commission on the net profits of the Colours Trading Co., calculated by deducting from the gross profits of the business the salaries, wages and other outgoings. The expression "outgoings" is not restricted to business or commercial outgoings. The agreement specifically disentitles the employers to make deductions of capital expenditure, but there is no indication that the outgoings are to be business outgoings only. There is nothing in the agreement or in the context justifying the view that in the expression 'outgoings' is not included the Excess Profits Tax paid by the assessees.

In *Commissioner of Income-tax, Delhi* v. *Delhi Flour Mills Co. Ltd.*,[1] it was observed by this Court in construing a similar agreement that the Excess Profits Tax was a part of the profits itself, but it was no part of the net profits contemplated by the parties; if it was a part which had to be deducted in arriving at the net profits, that is to say, the divisible profits which alone the parties had in mind, as a matter of construction the net profits meant divisible profits and were to be ascertained after deduction of Excess Profits Tax.

Counsel for the Revenue has not challenged the decision of the High Court that in computing taxable income for the purpose of Income-tax commission paid to the various employees is a permissible deduction under section 10 (2) (*x*) of the Income-tax Act. The only question which survives on this branch

1. (1959) S.C.J. 380: A.I.R. 1959 S.C. 185.

for consideration is, therefore, whether those deductions are permissible in the assessment of Excess Profits Tax.

By section 21 of the Excess Profits Tax Act, amongst other provisions, section 10 of the Income-tax Act is made applicable with modifications if any as may be prescribed as if it were a provision of the Excess Provts Tax Act and refers to the Excess Profits Tax instead of Income-tax. By section 2 (19), the expression "profits" means profits determined in accordance with Schedule 1 of the Act which lays down the rules for computation of profits for the purpose of Excess Profits Tax Act. Rule 12 of Schedule 1 (which was added by section 4 of the Excess Profits Ordinance, 1943) provided as follows:

"(1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned:

Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax.

(2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may appeal in the prescribed time and manner to the Appellate Tribunal.

(3) In relation to chargeable accounting periods ending after the 31st day of December, 1942, the Central Government may make rules for determining the extent to which deductions shall be allowed in respect of bonuses or commissions paid.

We were informed at the bar that though authorised, the Central Government did not make rules for determining the extent to which deductions shall be allowed in respect of bonuses or commissions paid. The Excess Profits Tax Act was substituted as from the year 1946 by the Business Profits Tax Act, 1947. That Act also defined by section 2, clause (16), the expression "profits" as meaning profits determined in accordance with Schedule 1 and by section 19, the provisions of the sections of the Indian Income-tax Act as applied to the Excess Profits Tax Act by virtue of sections 21 and 21-A in so far they were not repugnant to the provisions of the Business Profits Tax Act applied to that Act as they applied to Excess Profits Tax Act and by clause (3) of Schedule 1, a provision substantially similar to clauses (1) and (2) of clause 12, Schedule 1, of the Excess Profits Tax Act was incorporated.

Profits of a business for purposes of Excess Profits Tax Act have to be ascertained by reference to section 10 of the Income-tax Act modified to the extent directed by Schedule I of the Excess Profits Tax Act. By clause (12) of Schedule I of the Excess Profits Tax Act, a deduction in respect of expenses in excess of the amounts which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and in the case of payments for services to the actual services rendered by the persons concerned, is not to be allowed. The deduction to be allowed, it is true, does not depend upon any subjective satisfaction of the Excess Profits Tax Officer, but on objective standards as to what is reasonable and necessary having regard to the requirements of the business and in the case of payments for services to the actual services rendered by the persons concerned. The order passed by the Excess Profits Tax Officer is open to review by the Tribunal to which appeal against the order of the Excess Profits Tax Officer lies. But in considering whether the deduction is properly claimed, the primary duty is vested by the Legislature in the Excess Profits Tax Officer. It is for him subject to review by the Tribunal to decide whether the deduction is reasonable and necessary, having regard to the requirements of the business and in case of payments for

services to the actual services rendered. Th jurisdiction which the High Court exercises on questions referred to it under the Excess Profits Tax Act is merely advisory; the High Court is not sitting in appeal over the judgment of the taxing authorities. If the taxing authorities having regard to the circumstances come to a conclusion that expenditure claimed as a deduction is not reasonable and necessary, it is not open to the High Court to substitute its own view as to what may be regarded as reasonable and necessary. Even if the High Court holds that the taxing authorities have committed an error in law by misconceiving the evidence, or by applying erroneous tests, or otherwise by acting perversely, the High Court may in answering the questions submitted, lay down the true principles applicable to the ascertainment of the permissible deductions and leave it to the taxing authorities to adjudicate upon the reasonableness and necessity of the expenses in the light of the requirements of the business.

In the case in hand, the Excess Profits Tax Officer held, (*a*) that the employees of the assessees were being amply remunerated for services rendered by adequate salary, generous dearness allowance and annual bonus equal to the basic salary, (*b*) that the emoluments of the employees had been increased year after year and there was no material to show that the employees had made a persistent demand for increased emoluments, (*c*) that the commission was credited to the employees' account at the end of the year and was carried forward but no payments were made to them, (*d*) that the agreements which had been produced by the assessees were fabricated with a view to reduce tax liability, and (*e*) that the expenditure claimed was not proved to have been laid out wholly and exclusively for the purpose of the business. Taking into account these circumstances, the Excess Profits Tax Officer held that the remuneration paid to the employees was adequate and any additional commission paid was in excess of what was reasonable and necessary. The only criticism urged by counsel for the assessees against the grounds given is that the Excess Profits Tax Officer observed that while the net profit according to the Profit and loss Account of the firm was Rs. 20,487 leaving a share of Rs. 6,800 only to each of the partners, some of the managers got more than this amount. It appears that the Excess Profits Tax Officer committed an error in so observing. The profits of the Colours Trading Co., as disclosed by the order of assessment for the year 1945-46 were Rs. 99,435 and not Rs. 20,487; but that error did not affect the ultimate conclusion recorded by the Excess Profits Tax Officer. According to the books of account of the assessees for the year 1943-44 of the business in dyes, the profits were Rs. 99,435 and they claimed to have distributed a commission of Rs. 1,00,715 to their employees out of the emergency commission, which was *prima facie* wholly disproportionate to the amount received by them.

The order passed by the Excess Profits Tax Officer was confirmed in appeal by the Appellate Tribunal. In the view of the Appellate Tribunal, no additional incentive was required to sell dyes and chemicals in the years in question because dyes and chemicals were in short supply and there was a rise in demand. The Tribunal also referred to the table setting out the distribution among the employees of dearness allowance, bonus and salary in the relevant years, and observed:

"In addition to the generous allowances, the payment of this sum appears to us a payment made in order to dissipate the profits. It would be sufficient to say that including the commission alleged to have been paid, the total emoluments would be something like 1200 per cent. and in some cases even more than the basic annual salary. There is no doubt in our mind, that this was wholly unnecessary for business purposes."

Observing that the assessees having no sub-distributors, the direction given by the I.C.I. did not require the assessees to "pass on" the commission to their employees, they concluded that the expenditure alleged to have been incurred was not reasonable and necessary within the meaning of rule 12, Schedule I, of the Excess Profits Tax Act.

The following table which is incorporated in the statement of case of the Tribunal sets out for the four years in question the emergency commission received by the assessees and the aggregate amount paid by them to their employees.

Assessment year.	Extra commission received by the assessee.	Amount of commission paid by the assessee.
	Rs.	Rs.
1945—46	1,28,533	1,00,715
1946—47	3,20,391	2,44,698
1947—48	3,15,934	1,28,506
1948—49	3,70,964	1,75,079

This distribution out of the emergency commission to the employees has to be viewed in the context of the following circumstances set out by the Tribunal:

(1) that even though the I.C.I. recommended payment to sub-distributors and the assessees had no sub-distributors, they claimed to have paid commission to their employees at rates in excess of the minimum rates recommended by I.C.I.

(2) that this commission was paid to the employees in branches in which the annual turnover did not exceed Rs. 1,00,000 even though the agreements which the assesees had executed expressly provided that the commission was to be paid only if the annual turnover in a branch exceeded Rs. 1 lakh and

(3) that the basic salaries of the employees had been substantially increased from time to time and generous dearness allowance and Deepavali bonus were given besides the annual bonus to the employees.

An analysis of annexure "L" to the supplemental statement of case made by the Tribunal discloses some striking instances of payments to employees. One Themaswamy was paid annually commission varying from Rs. 15,000 to Rs. 23,000 when his basic salary was Rs. 2,100 per annum; one K. N. Rajagopalachari was paid commission varying from Rs. 16,000 to Rs. 12,000 when his basic salary was Rs. 1,260 per annum; one S. L. Radhakrishnan was paid commission varying from Rs. 5,700 to Rs. 13,000 when his salary varied between Rs. 516 and Rs. 636 per annum and one K. R. Rama Rao was paid commission varying from Rs. 4,600 to Rs. 10,520 his salary being Rs. 492 and later increased to Rs. 612 per annum.

There was thus ample evidence in support of the conclusion of the Excess Profits Tax Officer which was confirmed by the Tribunal. As we have already observed, it is the province of the Excess Profits Tax Officer and the Tribunal to assess the permissible deductions in the context of reasonableness and necessity having regard to the requirements of the business and interference with the conclusion is permissible if the view of the Taxing Authorities is vitiated by an error of law or is not based on any materials, or the conclusion is such that no man instructed in law could have arrived at. It is true that in considering whether the deduction claimed by the assessees for payments made as bonus or

commission paid to an employee is to be allowed, the taxing officer must have regard to the provisions of section 10 (2) (x) of the Income-tax Act and clause (12) of Schedule I of the Excess Profits Tax Act; and in assessing the reasonableness, consideration of commercial expediency must undoubtedly be taken into account. But commercial expediency must be viewed in the light of the requirements of the business and the actual services rendered by the persons concerned. Any abstract consideration of commercial expediency is out of place.

In our view, the High Court was not justified in seeking to re-appreciate the evidence on which the conclusion of the Excess Profits Tax Officer which was confirmed by the Tribunal was based. Their jurisdiction being advisory, the High Court had to answer the questions submitted for opinion on the facts found; if the High Court held the view that the Taxing Authorities had misdirected themselves in law or had made a wrong inference in law or had failed to apply the correct tests or had misconceived the evidence, it was open to them to invite the attention of Taxing Authorities to the error committed by them; but the High Court could not set aside the decision of the Taxing Authorities on a re-appreciation of the evidence. We may also point out that even if the High Court concluded that the total disallowance of the deduction claimed was not justified, the High Court could not substitute its own view as to what was reasonable and necessary. The High Court had, if it disagreed with the taxing authorities, still to answer the questions submitted and leave to the consideration of the Excess Profits Tax Officer what in the circumstances was reasonable and necessary.

Counsel for the assessees submitted that in any event, the Tribunal having in its supplementary statement of case stated that payment in excess of what was recommended by the I.C.I. was unjustified, this Court may so modify the order of the High Court that deductions of the amounts which were recommended by the I.C.I. may be regarded as permissible deductions. The I.C.I. recommended distribution of a certain percentage out of the emergency commission to the sub-distributors; but in the administrative set up of the assessees, the sub-distributors did not find a place. The assessees carried on their business through paid employees. In terms therefore the recommendation by the I.C.I. had no application to the assessees. It is true that even if the assessees did not carry on the business through sub-distributors, payment made to its employees if reasonable and necessary having regard to the requirements of the business, may still be deductible, but that in our judgment is a matter to be decided by the Taxing Authorities and not by us. The Tribunal had come to the conclusion that no payment in addition to the salary, annual bonus and special bonus was justified and any expression of opinion to the contrary in the supplementary statement pursuant to the order for statement of case could not in our judgment affect the conclusion originally recorded.

In our view the answer to the question whether the disallowance by the E.P.T. authorities of the commission paid to branch managers was justified under rule 12, Schedule I, of the Excess Profits Tax Act should have been answered in the affirmative. On the view taken by us, Appeal No. 494 of 1958 will be allowed, but there will be no order as to costs.

Appeal No. 495 of 1958 will be allowed with costs.

Appeals allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—J. L. KAPUR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The Commissioner of Income-tax, Bombay .. *Appellant**

v.

Dwarkadas Khetan & Co. .. *Respondent.*

Income-tax Act (XI of 1922), section 26-A—Document with minor included as full partner—If can be dealt with as one admitting minor only to benefits of partnership and registered.

Under section 26-A of the Income-tax Act and the Rules, the Income-tax Officer is only empowered to register a partnership which is specified in the instrument of partnership and of which registration is asked for. It is not open to the department to register a partnership different from that which is formed by the instrument. Where a minor is admitted as a full partner with equal rights and obligations with adults, the deed is invalid and cannot be registered. The document cannot be registered interpreting it to mean that the minor has been admitted to the benefits of partnership and not as a full partner.

Jakka Devayya & Sons v. *Commissioner of Income-tax,* (1952) 22 I.T.R. 264, overruled.

Hoosen Kassam Dada v. *Commissioner of Income-tax, Bengal,* (1937) 5 I. T. R. 182; *Hardutt Ray Gajadhar Ram* v. *Commissioner of Income-tax,* (1950) 18 I. T. R. 106 and *Banka Mal Lajja Ram & Co.* v. *Commissioner of Income-tax,* (1953) 24 I. T. R. 150, approved.

Appeal by Special Leave from the Judgment and Order, dated the 23rd February, 1956, of the Bombay High Court in Income-tax Reference No. 34 of 1955.

K. N. Rajagopal Sastri, Senior Advocate (*D. Gupta,* Advocate, with him), for Appellant.

Rameshar Nath, S. N. Andley, J. B. Dadachanji and *P. L. Vohra,* Advocates of *Messrs. R. N. & Co.,* for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—The Commissioner of Income-tax has filed this appeal, with Special Leave, against the Judgment and Order of the High Court of Bombay, by which the High Court answered two questions referred to it in favour of the respondents, Messrs. Dwarkadas Khetan & Co., Bombay. These questions were:

"(1) Whether the instrument of partnership, dated 27th March, 1946, created a deed of partnership?

(2) If the answer to question No. 1 is in the affirmative, whether the fact that on 1st January, 1946, there was no firm in existence would be fatal to the application for registration of the firm under section 26-A of the Indian Income-tax Act or whether the firm could be registered with effect from 26th March, 1946, if it is held that the firm was genuine?"

Prior to January 1, 1945, there was a firm called Dwarkadas Khetan & Co. On that date, the firm ceased to exist, because the other partners had previously withdrawn, and it came to be the sole proprietary concern of Dwarkadas Khetan. On February 12, 1946, Dwarkadas Khetan obtained the selling agency of Seksaria Cotton Mills, Ltd. On March 27, 1946, he entered into a partnership with three others by an instrument of partnership executed that day. Those three others were Viswanath Purumul, Govindram Khetan and Kantilal Kasherdeo. Dwarkadas Khetan's share in the partnership was 7 annas in the rupee, while the remaining 9 annas' share was divided equally among the three others. Though Kantilal Kasherdeo was a minor, he was admitted as a full partner and not merely to the benefits of the partnership,

*C. A. No. 328 of 1959. 1st December, 1960.

as required by section 30 of the Indian Partnership Act. To the instrument of partnership, Kantilal Kasherdeo was also a signatory, though immediately after his signature there was the signature of one Kasherdeo Rungta, the natural guardian of the minor. In the instrument, Kantilal Kasherdeo was described as full partner entitled not only to a share in the profits but also liable to bear all the losses including loss of capital. It was also provided that all the four partners were to attend to the business, and if consent was needed, all the partners including the minor had to give their consent in writing. The minor was also entitled to manage the affairs of the firm, including inspection of the account books, and was given the right to vote, if a decision on votes had to be taken. In short, no distinction was made between the adult partners and the minor, and to all intents and purposes, the minor was a full partner, even though under the partnership law he could only be admitted to the benefits of the partnership and not as a partner.

The deed of partnership was produced before the Registrar of Firms showing the names of the four partners. The Registrar of Firms granted a registration certificate, and in the certificate, Kantilal Kasherdeo was shown as a full partner and not as one entitled merely to the benefits of the partnership. Banks were also informed about the four partners, and it does not appear that to them intimation was sent that one of the named partners was a minor. Though the partnership came into existence on March 27, 1946, the firm was stated to have started retrospectively from January 1, 1946. It may be pointed out that the firm has the Calendar year as its account year, and the matter before us refers to the account year, 1946, corresponding to the assessment year, 1947-48.

For purposes of that year, registration of the firm was sought under section 26-A of the Indian Income-tax Act. The Income-tax Officer refused to accord registration on the ground that a minor had been admitted as a partner contrary to law, and that the deed could not, therefore, be registered. The appeal to the Appellate Assistant Commissioner also failed, the Commissioner holding that registration could only be of a legal or valid document and not of a document which was invalid in law. An appeal was then taken to the Tribunal, and it was contended that the document must be construed as showing only that the minor was admitted not as a full partner but to the benefits of the partnership. The Accountant Member held that the order of the Appellate Assistant Commissioner was correct, giving two reasons. The first was that the construction sought to be placed upon the document was not open, and the second, that since retrospective operation was given to the firm even though no firm existed from January 1, 1946, registration could not be granted. The Judicial Member differed from the Accountant Member, holding, as was contended, that the document must be construed as showing merely that the minor had been admitted to the benefits of the partnership. The appeal was then placed before the President, who agreed with the conclusion of the Accountant Member, with the result that the refusal to register the firm under section 26-A by the authorities was upheld.

Two questions were then posed for the decision of the High Court. The High Court differed from the Tribunal, and answered both the questions in favour of the assessee. In so far as the second question is concerned, the matter is now settled by the decision of this Court in *R. C. Mitter & Sons* v. *Commissioner of Income-tax.*[1] But, in our opinion, the decision of the High Court on the first question was not correct, and the correct answer does not leave the second question open at all.

1. 1959 S.C.J. 1011: (1959) 2 M.L.J. (S.C.) 192: (1959) 2 An.W.R. (S.C.) 192: (1959) 36 I.T.R. 194.

There is a distinct cleavage of opinion among the High Courts on this point. The Bombay, Madras and Patna High Courts have held that where a minor is admitted as a full partner by adult partners, the document can be registered after interpreting it to mean that the minor has been admitted to the benefits of partnership and not as a full partner. The Calcutta, Allahabad and Punjab High Courts have taken a contrary view. The Bombay case is the one which is under appeal, and the Patna High Court followed that decision and the two earlier decisions of the Madras High Court. The Madras High Court decisions are of the same Divisional Bench, and were pronounced on the same day. The leading case in support of the respondents is the Madras decision reported in *Jakka Devayya and Sons* v. *Commissioner of Income-tax*,[1] and that case alone needs to be considered, because all the reasons on which the cases on this side have proceeded are given there. In that case, there were three partners, one of whom was a minor. They formed a Hindu undivided family; later, a deed of partnership was executed in which the minor was represented by his father-in-law. It was held that the fact that the minor was included as a partner did not make the partnership as between the two adult partners invalid, and that the minor must be deemed to have been admitted to the benefits of the partnership by the two adults. The learned Judges referred to the provision of section 2 (6-B) of the Income-tax Act, where it is provided:

"'Partner' includes any person who being a minor has been admitted to the benefits of partnership.",

and observed that in view of this definition and the fact that a minor could be admitted to the benefits of partnership under section 30, the document was not invalid, but must be read as giving to the minor the rights laid down by the Partnership Act. They also observed that too rigid a construction need not be put upon the deed, and referred to Lindley on Partnership, 11th Edition, page 87 and *A. Khorasany* v. *C. Acha* and *others*[2]. The other cases which we need not examine are *Vincent and others* v. *Commissioner of Income-Income-tax*,[3] and *Sahai Brothers* v. *Commissioner of Income-tax*.[4]

On the other hand, there is a decision of the Calcutta High Court reported in *Hoosen Kassam Dada* v. *Commissioner of Income-tax, Bengal*,[5] in which Costello and Panckridge, JJ., have held that under section 26-A of the Income-tax Act and the Rules, the Income-tax Officer is only empowered to register a partnership which is specified in the instrument of partnership and of which registration is asked for. The learned Judges, therefore, hold that it is not open to the Department to register a partnership different from that which is formed by the instrument. In *Hardutt Ray Gajadhar Ram* v. *Commissioner of Income-tax*,[6] Malik, C.J., and Seth, J., hold that where a minor is admitted as a full partner with equal rights and obligations with adults, the deed is invalid. It is pointed out that the English law on the subject is different. In that case, however, there was one other ground for invalidating the deed, because the minor had been adopted into another family and his natural father who had signed as his guardian in the deed could not do so, as he had ceased to be the natural guardian. The decision, however, supports the case of the Commissioner.

In *Banka Mal Lajja Ram & Co.* v. *Commissioner of Income-tax*,[7] it is held that a minor cannot be a partner, and that the partnership which admits

1. (1952) 2 M.L.J. 555 : (1952) 22 I.T.R 264.
2. (1928) I.L.R. 6 Rang. 198.
3. (1952) 22 I.T.R. 285 : (1952) 2 M.L.J. 545.
4. (1958) 33 I.T.R. 40.
5. (1937) 5 I.T.R. 182.
6. (1950) 18 I.T.R. 106.
7. (1953) 24 I.T.R. 150.

a minor as full partner cannot be registered. It is true that in that case the High Court did not consider the question whether the partnership should have been taken to be a valid partnership consisting of the adult partners, because no such question was referred. The decision, however, is against a claim for registration of such a document.

In our opinion, the Calcutta view is preferable to the view taken by the Madras High Court. The error in the Madras view is in using the definition to show that a deed including a minor as a competent partner is valid. What the definition does is to apply to a minor admitted to the benefits of partnership all the provisions of the Income-tax Act applicable to partners. The definition cannot be read to mean that in every case where a minor has, contrary to law, been admitted as a full partner, the deed is to be regarded as valid, because, under the law, a minor can be admitted to the benefits of partnership. The Rules which have been framed under section 26-A quite clearly show that a minor who is admitted to the benefits of partnership need not sign the application for registration. The law requires all partners to sign the application, and if the definition were to be carried to the extreme, even a minor who is admitted to the benefits of partnership would be competent to sign such an application. The definition is designed to confer equal benefits upon the minor by treating him as a partner; but it does not render a minor a competent and full partner. For that purpose, the law of Partnership must be considered, apart from the definition in the Income-tax Act.

Section 30 of the Indian Partnership Act clearly lays down that a minor cannot become a partner, though with the consent of the adult partners, he may be admitted to the benefits of partnership. Any document which goes beyond this section cannot be regarded as valid for the purpose of registration. Registration can only be granted of a document between persons who are parties to it and on the covenants set out in it. If the Income-tax Authorities register the partnership as between the adults only contrary to the terms of the document, in substance a new contract is made out. It is not open to the Income-tax authorities to register a document which is different from the one actually executed and asked to be registered. In our opinion, the Madras view cannot be accepted.

The Judgment under appeal has followed the Madras view, and, in our opinion, it falls into the same error in which the Madras High Court had fallen earlier. The answer to the first question should, therefore, have been in favour of the Department. The answer given by the High Court is vacated, and the question will now be answered in the negative. As already stated, there is no need to answer the second question, which does not arise.

The appeal is allowed with costs here and in the High Court.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice,* J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, K. C. DAS GUPTA, AND J. C. SHAH, JJ.

Lt. Col. Khajoor Singh .. *Appellant**

v.

The Union of India & another .. *Respondents.*

S. S. Lathar .. *Intervener.*

Constitution of India (1950), *Article* 32 (2-A) (*Applicable to the State of Jammu and Kashmir only*) *and Article* 226—*Scope of jurisdiction—Writ against the Union of India—If can be issued by State High Courts.*

By Majority (*Subba Rao,* and *Das Gupta, JJ.,* holding contra):—There is two-fold limitation on the power of the High Court to issue writs, etc., under Article 226 of the Constitution of India, 1950, namely (i) the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction," that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction and (ii) the person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories.

The clause "Including in appropriate cases any Government" goes with the preceding word "authority" and on a plain and reasonable construction it means that the word "authority" in the context may include any Government in an appropriate case. Though the Constitution provides no *situs* for the seat of the Government of India; the seat from which it functions, as a matter of fact, is Delhi; and only that High Court exercising jurisdiction over that place "within its territories" can issue writs, etc., against the Union of India.

Election Commission, India v. *Saka Venkata Subba Rao,* 1953 S.C.R. 1144 and *K. S. Rashid & Son* v. *The Income-tax Investigation Commission, etc.,* 1954 S. C. R. 738, re-affirmed.

The jurisdiction of the High Court depends on the person or authority passing the order being within those territories in relation to which it exercises jurisdiction and the residence or location of the person affected thereby can have no relevance on the question of jurisdiction of the High Court.

The concept of cause of action cannot be introduced in Article 226, because it would amount to doing away with the express provision contained therein which requires that the person or authority to whom the writ is to be issued should be resident in or located within the territories over which the High Court has jurisdiction.

Per *Subba Rao, J.*—The power of the High Court under Article 226 is of the widest amplitude and is not confined only to issuing of writs in the nature of *habeas corpus,* etc., for it can also issue directions against any person or authority including in appropriate cases any Government and the words "any Government" in their ordinary significance must include the Union Government. The Union Government has no Constitution *Situs* in a particular place, and therefore must be deemed in law to have functional existence throughout India when by exercise of its powers the Union Government makes an order infringing the legal right or interest of a person residing within the territories in relation to which a particular High Court exercises jurisdiction, that High Court can issue a writ to the Union Government, for, in law, it must be deemed to be within that State also. The High Court by issuing a writ against the Union Government is not travelling beyond its territorial jurisdiction as the order against the said Government is issued 'within' the State.

Article 32 (2-A) of the Constitution enables the High Court of Jammu and Kashmir to issue a writ to the Union Government in respect of the act done by it infringing the fundamental rights of the parties in that State.

Per *K. C. Das Gupta, J.*—The Government of the Union or of any State cannot be said to have a location in the same was as a "person or authority" has being present at a place for the time being or where the office of the authority is situate. By Government we mean the "executive organ" thereof and it may function from *any place within its territories.*

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*C. A. No. 37 of 1955. 5th December, 1960.

It is neither correct nor appropriate to speak of the *situs* of any Government. "Any Government" is used to denote the Government functioning in those territories and would include the Government of India also. Thus the Government of India is within the territories of every High Court in India; but the only High Court which has jurisdiction to issue a writ or order or directions under Article 226 or Article 32 (2-A) against it is the one within the territories under which the act or omission against which relief was sought took place. Where as in the instant case, the act was performed at Delhi (within the jurisdiction of the Punjab High Court) the Jammu and Kashmir High Court cannot exercise its jurisdiction under Article 226 or 32 (2-A).

Appeal from the Judgment and Order dated the 7th December, 1954, of the Jammu & Kashmir High Court in Criminal Miscellaneous No. 76 of 2011.

Vir Sen Sawhney, Advocate, for Appellant.

C. K. Dapthtary, Solicitor-General of India (*B. R. L. Iyengar, R. H. Dhebar* and *T. M. Sen,* Advocates, with him) for Respondents.

Sardar Bahadur, Advocate, for Intervener.

The following Judgments of the Court were delivered:

Sinha, C. J. (on behalf of the majority).—This appeal on a certificate of fitness granted by the High Court of Judicature, Jammu and Kashmir is directed against the Judgment and Order, dated December 7, 1954, in an application under Article 32 (2-A) of the Constitution for issue of a writ, directions or order against the Union of India, through the Secretary, Ministry of Defence, New Delhi, as the first respondent and the State of Jammu and Kashmir through the Chief Secretary, Jammu and Kashmir State as the second respondent.

The petition is based on the following allegations. The petitioner will be referred to as the appellant in the course of this judgment. He was aged 45 years 262 days on August 12, 1954. He was holding a regular commission in the Jammu and Kashmir State Forces, which were amalgamated with the Defence Forces of the Union with effect from September 1, 1949. The appellant holding the substantive rank of Lieut.-Col. in the amalgamated forces had the right to continue in service until he attained the age of 53 years, which event will happen on November 20, 1961. The Government of India issued a letter, dated July 31, 1954, retiring the appellant from the service with effect from August 12, 1954. This decision of the Government of India is not based on any allegations or charge of inefficiency, indiscipline or any other irregularity on the part of the appellant. The aforesaid decision of the Government of India prematurely retiring the appellant is impugned as illegal, unwarranted and discriminatory and as having been made in contravention of Article 16 (1) of the Constitution.

The petition was opposed on behalf of the respondents aforesaid on a number of preliminary grounds of which it is only necessary to mention the first namely, that the authority against whom the writ is sought, that is to say, respondent No. 1, being outside the territorial limits of the jurisdiction of the Jammu and Kashmir High Court, the same was not maintainable. This preliminary objection was heard by a Division Bench, (Janki Nath Wazir, C.J. and M. A. Shahmiri, J.) Jammu and Kashmir High Court. By its judgment, dated December 7, 1954, the High Court upheld the preliminary objection. The High Court, relying upon the decisions of this Court in *Election Commission, India* v. *Saka Venkata Subba Rao*[1] and *K. S. Rashid & Son* v. *The Income-tax Investigation Commission, etc.*[2] held that it had no jurisdiction to

1. (1953) S.C.J. 293: (1953) 1 M.L.J. 702: (1953) S.C.R. 1144.

2. (1954) S.C.J. 264: (1954) S.C.R. 738.

issue a writ against the first respondent and, therefore, dismissed the petition, but the High Court granted the necessary cerrtificate under Article 132 of the Constitution; hence this appeal.

The matter was first heard by a Bench of five Judges. In the course of hearing it became clear to us that the appellant not only sought to distinguish the two decisions aforesaid of this Court, but questioned the correctness of those decisions. Hence this larger Bench was constituted in order to examine the correctness of the decisions aforesaid of this Court on the strength of which the High Court had refused to entertain the appellant's petition, on merits.

It has been argued on behalf of the appellant, in the first instance, that the previous decisions of this Court were distinguishable on the ground that they did not, in terms, consided the question whether the Government of India was amenable to the jurisdiction of the High Court under Article 226 or of the Jammu and Kashmir High Court under Article 32 (2-A) of the Constitution; that those provisions, on a true construction, would not stand in the way of the appellant, inasmuch as the Government of India has no location and its authority is present throughout the Union territory; that the correct test is whether or not the cause of action arose within the territorial limits of the High Court's jurisdiction; that the High Court was in error in holding that the term "authority" included a Government.

In answer to these contentions on behalf of the appellant, the learned Solicitor-General contended that, on a proper construction of the relevant provisions of the Constitution, it is clear that Sastri, C. J.'s observations relating to "authority" in the case of *Election Commission, India* v. *Saka Venkata Subba Rao*[1] applied with equal force to Government, including the Union Government. The Government of India functions through its officers and, therefore, the location contemplated means the place at which the orders impugned are ordinarily passed. The considerations in a suit with reference to the cause of action for the suit do not stand on the same footing in a writ matter, because the writ has to reach the particular officers of the Government concerned. The expression "in appropriate cases" means that there may be cases where though the Union Government as such is not located within the territorial limits of a High Court yet a writ may be issued against it by the High Courts because an officer of the Union Government is functioning within such limits and it is his order which is the subject-matter of the controversy. Therefore, it is not in every case that a High Court can issue a writ against the Union. A writ of *mandamus*, for example, is directed against a particular named person or authority. Similarly, a writ of *certiorari* is directed against a particular record. Therefore, the writ must issue to someone within the territorial limits of the High Court's jurisdiction.

The question that we have to determine in this case is of far-reaching importance and is not a matter of first impression. The question was first raised in this Court in 1952 and was determined by a Constitution Bench in the case of *Election Commission, India* v. *Saka Venkata Subba Rao*[1]. In that case a writ was applied for in the Madras High Court for restraining the Election Commission from enquiring into the alleged disqualification of the respondent. A single Judge of the High Court of Judicature of Madras issued a writ of prohibition restraining the Election Commission, a statutory authority constituted by the President of India, with its office permanently located at New Delhi, when the matter was heard by the learned single Judge of the

1. (1953) S.C.J. 293: (1953) 1 M.L.J. 702: (1953) S.C.R. 1144.

High Court. In the High Court the Election Commission demurred to the jurisdiction of the Court to issue any writ against it on the ground that the Commission was not within the territory in relation to which the High Court exercised jurisdiction, apart from other objections. The learned Judge of the High Court overruled the preliminary objection and decided the case on merits, and issued a writ prohibiting the Commission from proceeding with the enquiry. The learned Judge granted the certificate under Article 132 that the case involved a substantial question of law as to the intepretation of the Constitution. The Election Commission accordingly came up in appeal to this Court and challenged the jurisdiction of the Madras High Court to issue the writ it had purported to do. This Court overruled the contention on behalf of the respondent which was based on the decision of the Privy Council in the *Parlakimedi case*[1] that the jurisdiction of the High Court to issue a writ is analogous to the jurisdiction of a Court to grant a decree or order against persons outside the limtis of its local jurisdiction, provided that the cause of action arose within those limits. This Court overruled that contention in these words:—

"The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Article 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction".

The Constitution Bench in that case considered that the language of Article 226 of the Constitution was "reasonably plain" and that the exercise of the power conferred by that Article was subject to a two-fold limitation, namely, (1) that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction" and (2) that the person or authority to whom the High Court is empowered to issue the writs must be "within those territories". In other words, the writ of the Court could not run beyond the territories subject to its jurisdiction and that the person or authority affected by the writ must be amenable to the Court's jurisdiction either by residence or location within those territories.

The second case of this Court, which dealt with this question is *K. S. Rashid and Son* v. *The Income-tax Investigation Commision, etc.*[2] That was a case on appeal from the judgment and order, dated August 10, 1950, of the High Court of Judicature, Punjab, at Simla, in a number of miscellaneous matters, in which the High Court had been moved under Articles 226 and 227 of the Constitution praying for quashing proceedings started against the appellants under the Taxation on Income (Investigation Commismission) Act (XXX of 1947). It was prayed in the High Court that a writ of prohibition might issue against the Income-tax Investigation Commission directing it not to proceed with the investigation of cases referred to it under the provisions of the Act. The writ petitions in the High Court were opposed on behalf of the Commission on a number of grounds, one of them being that the Punjab High Court had no jurisdiction to issue the writs prayed for under Article 226 of the Constitution, simply because the Commission was located in Delhi. Reliance was placed on behalf of the Commission on the decision of the Privy Council in the *Parlakimedi case*[1] that the substance of the matter was that the assessees against whom the investigation had been started belonged to U. P. and all the assessment proceedings, including reference to the High Court, would lie in Uttar Pradesh. The High Court gave effect to this contention and dismissed the application primarily on the ground that the High Court had no jurisdiction to issue the writ to the Commission. The assessees

1. (1943) 2 M.L.J. 254: L.R. 70 I.A. 129: I.L.R. (1944) Mad. 457.

2. (1954) S.C.J. 264: (1954) S.C.R. 738.

came up in appeal to this Court, and this Court substantially adopted the reasons given by it in its previous judgment in the case of *Election Commission, India* v. *Saka Venkata Subba Rao*[1]. It is to be noted that when the High Court of Punjab decided the case, the decision of this Court referred to above had not been given. Relying upon its previous decision, this Court held that the Punjab High Court was in error holding that it had no jurisdiction to deal with the matter under Article 226 of the Constitution. The appeal was dismissed by this Court on other grounds, not material to this case.

Learned counsel for the appellant has contended that the two decisions of this Court referred to above are distinguishable from the facts of the present case, inasmuch as in those cases the Election Commission and the Income-tax Investigation Commission were statutory bodies, which had their location in Delhi, and, therefore, this Court held that the Punjab High Court was the High Court within whose jurisdiction those bodies functioned and had their location and were, therefore, amenable to its jurisdiction. He further contended that the Union Government functioned throughout the territory of India and could not be said to be located only in Delhi simply because the capital for the time being was in Delhi. In this connection, strong reliance was placed on the decision of the Full Bench of the Allahabad High Court in *Maqbulnissa and others* v. *Union of India and another*.[2] That case does lend a great deal of support to this contention on behalf of the appellant. It was held by the High Court in that case that the words "any Government" in Article 226 (1) of the Constitution clearly indicated that the Allahabad High Court had jurisdiction to entertain the petition under Article 226, not only against the State of Uttar Pradesh, but also against the Union Government for the issue of a writ in the nature of *mandamus*, directing the Government to forbear from giving effect to the order asking the petitioner to leave India. The ratio of the decision was that, even though the capital of the Government of India is in Delhi, its executive power extends throughout the territory of India and that the real test to determine the jurisdiction would be the residence of the petitioners and the effect of the impugned order upon them. After holding that the High Court had the jurisdiction to entertain the petition, the Court dismissed it on other grounds, not material to this case. The Allahabad High Court distinguished the decision of a Division Bench of the Calcutta High Court, dated January 17, 1951, in the case of *The Lloyds Bank, Ltd.* v. *The Lloyds Bank Indian Staff Association (Calcutta Branches)*[3]. In that case. Harries, C.J., speaking for the Court, had held that though Article 226 of the Constitution had gone beyond the English practice by providing that writs in the nature of prerogative writs could issue even against a Government, that Government must be located within the territorial limits of the Court which was moved to exercise its power under that Article. He further observed that the Government of India could not be said to be located in the State of West Bengal and, therefore, writs under Article 226 could not issue against that Government by the High Court of Calcutta. That decision of the Calcutta High Court was distinguished by the Allahabad High Court on the ground that

"the effects of the orders of the Union Government were not operative within the jurisdiction of the Court".

It may be added that that decision came up in appeal to this Court in Civil Appeal No. 42 of 1952 but the appeal was dismissed by this Court by its judg-

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1. (1953) S.C.J. 293: (1953) 1 M.L.J. 702: (1953) S.C.R. 1144.
2. I.L.R. (1953) 2 All. 289.
3. Since reported in I.L.R. (1954) 2 Cal. 1.

ment, dated April 20, 1952, on other grounds. It will be noticed that when the Allahabad decision, so strongly relied upon by the appellant, was given, the two decisions referred to above of this Court were not there. The Allahabad High Court may not have given that judgment if the two decisions of this Court had then been in existence.

The two main questions which arise, therefore, are: (*i*) whether the Government of India as such can be said to have a location in a particular place, *viz.*, New Delhi, irrespective of the fact that its authority extends over all the States and its officers function throughout India, and (*ii*) whether there is any scope for introducing the concept of cause of action as the basis of exercise of jurisdiction under Article 226. Before, however, we deal with these two main questions, we would like to clear the ground with respect to two subsidiary matters which have been urged on behalf of the appellant.

The first argument is that the word "authority" used in Article 226 cannot and does not include Government. We are not impressed by this argument. In interpreting the word "authority" we must have regard to the clause immediately following it. Article 226 provides for "the issue to any person or authority including in appropriate cases any Government" within those territories. It is clear that the clause "including in appropriate cases any Government" goes with the preceding word "authority", and on a plain and reasonable construction it means that the word "authority" in the context may include any Government in an appropriate case. The suggestion that the said clause is intended to confer discretion on the High Courts in the matter of issuing a writ or direction on any Government seems to us clearly unsustainable. To connect this clause with the issuance of a writ or order and to suggest that in dealing with cases against Government the High Courrt has to decide whether the case is appropriate for the issue of the order is plainly not justified by the rules of grammar. We have no hesitation in holding that the said clause goes with the word "authority" and that its effect is that the authority against whom jurisdiction is conferred on the High Court to issue a writ or appropriate order may in certain cases include a Government. Appropriate cases in the context means cases in which orders passed by a Government or their subordinates are challenged, and the clause therefore means that where such orders are challenged the High Court may issue a writ against the Government. The position, therefore, is that under Article 226 power is conferred on the High Court to issue to any person or authority or in a given case to any Government, writs or orders there specified for enforcement of any of the rights conferred by Part III and for any other purpose. Having thus dealt with the two subsidiary points raised before us, we may now proceed to consider the two main contentions which arise for our decision in the present appeal.

This brings us to the first question, namely, whether the Government of India as such can be said to be located at one place, namely, New Delhi. The main argument in this connection is that the Government of India is all pervasive and is functioning throughout the territory of India and therefore every High Court has power to issue a writ against it, as it must be presumed to be located within the territorial jurisdiction of all State High Courts. This argument in our opinion confuses the concept of locaton of a Government with the concept of its functioning. A Government may be functioning all over a State or all over India; but it certainly is not located all over the State or all over India. It is true that the Constitution has not provided that the seat of the Government of India will be at New Delhi. That, however, does not mean that the Government of India as such has no seat where it is located. It is common knowledge that the seat of the Government of India is in New Delhi

and the Government as such is located in New Delhi. The absence of a provision in the Constitution can make no difference to this fact. What we have to see, therefore, is whether the words of Article 226 mean that the person or authority to whom a writ is to be issued has to be resident in or located within the territories of the High Court issuing the writ? The relevant words of Article 226 are these—

"Every High Court shall have power......to issue to any person or authority...... within those territories......".

So far as a natural person is concerned, there can be no doubt that he can be within those territories only if he resides therein either permanently or temporarily. So far as an authority is concerned, there can be do doubt that if its office is located therein it must be within the territory. But do these words mean with respect to an authority that even though its office is not located within those territories it will be within those territories because its order may affect persons living in those territories? Now it is clear that the jurisdiction conferred on the High Court by Article 226 does not depend upon the residence or location of the person applying to it for relief; it depends only on the person or authority against whom a writ is sought being within those territories. It seems to us therefore that it is not permissible to read in Article 226 the residence or location of the person affected by the order passed in order to determine the jurisdiction of the High Court. That jurisdiction depends on the person or authority passing the order being within those territories and the residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction. Thus if a person residing or located in Bombay, for example, is aggrieved by an order passed by an authority located, say, in Calcutta, the forum in which he has to seek relief is not the Bombay High Court though the order may affect him in Bombay but the Calcutta High Court where the authority passing the order is located. It would, therefore, in our opinion be wrong to introduce in Article 226 the concept of the place where the order passed has effect in order to determine the jurisdiction of the High Court which can give relief under Article 226. The introduction of such a concept may give rise to confusion and conflict of jurisdictions. Take, for example, the case of an order passed by an authority in Calcutta, which affects six brothers living, say, in Bombay, Madras, Allahabad, Jabalpur, Jodhpur and Chandigarh. The order passed by the authority in Calcutta has thus affected persons in six States. Can it be said that Article 226 contemplates that all the six High Courts have jurisdiction in the matter of giving relief under it? The answer must obviously be 'No', if one is to avoid confusion and conflict of jurisdiction. As we read the relevant words of Article 226 (quoted above) there can be no doubt that the jurisdiction conferred by that Article on a High Court is with respect to the location or residence of the person or authority passing the order and there can be no question of introducing the concept of the place where the order is to have effect in order to determine which High Court can give relief under it. It is true that this Court will give such meaning to the words used in the Constitution as would help towards its working smoothly. If we were to introduce in Article 226 the concept of the place where the order is to have effect we would not be advancing the purposes for which Article 226 has been enacted. On the other hand, we would be producing conflict of jurisdiction between various High Courts as already shown by the illustration given above. Therefore, the effect of an order by whomsoever it is passed can have no relevance in determining the jurisdiction of the High Court which can take action under Article 226. Now, functioning of a Government is really nothing other than giving effect to the orders passed by it. Therefore it would not be right to introduce in Article 226 the con-

cept of the functioning of Government when determining the meaning of the words "any person or authority within those territories". By introducing the concept of functioning in these words we shall be creating the same conflict which would arise if the concept of the place where the order is to have effect is introduced in Article 226. There can, therefore, be no escape from the conclusion that these words in Article 226 refer not to the place where the Government may be functioning but only to the place where the person or authority is either resident or is located. So far therefore as a natural person is concerned, he is within those territories if he resides there permanently or temporarily. So far as an authority (other than a Government) is concerned, it is within the territories if its office is located there. So far as a Government is concerned it is within the territories only if its seat is within those territories.

The seat of a Government is sometimes mentioned in the Constitutions of various countries but many a time the seat is not so mentioned. But whether the seat of a Government is mentioned in the Constitution or not, there is undoubtedly a seat from which the Government as such functions as a fact. What Article 226 requires is residence or location as a fact and if therefore there is a seat from which the Government functions as a fact even though that seat is not mentioned in the Constitution the High Court within whose territories that seat is located will be the High Court having jurisdiction under Article 226 so far as the orders of the Government as such are concerned. Therefore, the view taken in *Election Commission, India* v. *Saka Venkata Subba Rao*[1] (supra) and *K. S. Rashid and Son* v. *The Income-tax Investigation Commission.*[2] (supra) that there is two-fold limitation on the power of the High Court to issue writs, etc. under Article 226, namely, (*i*) the power is to be exercised 'throughout the territories in relation to which it exercises jurisdiction', that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction, and (*ii*) the person or authority to whom the High Court is empowered to issue such writs must be "within those territories" which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories, is the correct one.

This brings us to the second point, namely, whether it is possible to introduce the concept of cause of action in Article 226 so that the High Court in whose jurisdiction the cause of action arose would be the proper one to pass an order thereunder. Reliance in this connection has been placed on the judgment of the Privy Council in *Ryots of Garabandho and other villages* v. *Zamindar of Parlakimedi and another.*[3] In that case the Privy Council held that even though the impugned order was passed by the Board of Revenue which was located in Madras, the High Court would have no jurisdiction to issue a writ quashing that order, as it had no jurisdiction to issue a writ beyond the limits of the city of Madras except in certain cases, and that particular matter was not within the exceptions. This decision of the Privy Council does apparently introduce an element of the place where the cause of action arose in considering the jurisdiction of the High Court, to issue a writ. The basis of that decision, however, was the peculiar history of the issue of writs by the three Presidency High Courts as successors of the Supreme Courts, though on the literal construction of clause 8 of the Charter of 1800 conferring jurisdiction on the Supreme Court of Madras, there could

1. (1953) S.C.J. 293: (1953) 1 M.L.J. 702 (1953) S.C.R. 1144.
2. (1954) S.C.J. 264 (1954) S.C.R. 738.
3. (1943) 2 M.L.J. 254 : I.L.R. (1944) Mad. 457 : L.R. 70 I.A. 129.

be little doubt that the Supreme Court would have the same jurisdiction as the Justices of the Court of King's Bench Division in England for the territories which then were or thereafter might be subject to or depend upon the Government of Madras. It will therefore not be correct to put too much stress on the decision in that case. The question whether the concept of cause of action could be introduced in Article 226 was also considered in *Saka Venkata Subba Rao's case*[1] and was repelled in these words:—

"The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Article 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction."

Article 226 as it stands does not refer anywhere to the accrual of cause of action and to the jurisdiction of the High Court depending on the place where the cause of action accrues being within its territorial jurisdiction. Proceedings under Article 226 are not suits; they provide for extraordinary remedies by a special procedure and give powers of correction to the High Court over persons and authorities and these special powers have to be exercised within the limits set for them. These two limitations have already been indicated by us above and one of them is that the person or authority concerned must be within the territories over which the High Court exercises jurisdiction. Is it possible then to overlook this constitutional limitation and say that the High Court can issue a writ against a person or authority even though it may not be within its territories simply because the cause of action has arisen within those territories? It seems to us that it would be going in the face of the express provision in Article 226 and doing away with an express limitation contained therein if the concept of cause of action were to be introduced in it. Nor do we think that it is right to say that because Article 300 specifically provides for suits by and against the Government of India, the proceedings under Article 226 are also covered by Article 300. It seems to us that Article 300 which is on the same line as section 176 of the Government of India Act, 1935, dealt with suits as such and proceedings analogous to or consequent upon suits and has no reference to the extraordinary remedies provided by Article 226 of the Constitution. The concept of cause of action cannot in our opinion be introduced in Article 226, for by doing so we shall be doing away with the express provision contained therein which requires that the person or authority to whom the writ is to be issued should be resident in or located within the territories over which the High Court has jurisdiction. It is true that this may result in some inconvenience to persons residing far away from New Delhi who are aggrieved by some order of the Government of India as such, and that may be a reason for making a suitable constitutional amendment in Article 226. But the argument of inconvenience, in our opinion, cannot affect the plain language of Article 226, nor can the concept of the place of cause of action be introduced into it for that would do away with the two limitations on the powers of the High Court contained in it.

We have given our earnest consideration to the language of Article 226 and the two decisions of this Court referred to above. We are of opinion that unless there are clear and compelling reasons, which cannot be denied, we should not depart from the interpretation given in these two cases and indeed from any interpretation given in an earlier judgment of this Court, unless there is a fair amount of unanimity that the earlier decisions are mani-

1. (1953) 1 M.L.J. 702: (1953) S.C.J. 293 : (1953) S.C.R. 1144.

festly wrong. This Court should not, except when it is demonstrated beyond all reasonable doubt that its previous ruling, given after due deliberation and full hearing, was erroneous, go back upon its previous ruling, particularly on a constitutional issue. In this case our reconsideration of the matter has confirmed the view that there is no place for the introduction of the concept of the place where the impugned order has effect or of the concept of functioning of a Government, apart from the location of its office concerned with the case, or even of the concept of the place where the cause of action arises in Article 226 and that the language of that article is plain enough to lead to the conclusion at which the two cases of this Court referred to above arrived. If any inconvenience is felt on account of this interpretation of Article 226 the remedy seems to be a constitutional amendment. There is no scope for avoiding the inconvenience by an interpretation which we cannot reasonably, on the language of the Article, adopt and which the language of the Article does not bear.

In this view of the matter the appeal fails and is hereby dismissed with costs.

Subba Rao, J.—I have had the advantage of perusing the judgment prepared by my Lord the Chief Justice. I regret my inability to agree. I would not have ventured to differ from his weighty opinion but for the fact that the acceptance of the contention of the respondents would practically deprive the majority of citizens of our country of the benefit of cheap, expeditious and effective remedy given to them under Article 226 of the Constitution against illegal acts of the Union Government. If the relevant provisions are clear and unambiguous, the said contention must prevail however deleterious the effect may be to public interest. But if the words of the Article are capable of two or more interpretations, one that will carry out the intention of the Constituent Assembly and the other that would defeat it, the former interpretation must necessarily be accepted. We must also bear in mind that the provisions of the Constitution are not "mathematical formulae which have their essence in mere form". It being an organic statute, its provisions must be construed broadly and not in a pedantic way, but without doing violence to the language used.

The facts have been fully stated in the judgment of my Lord the Chief Justice and it would be redundant to restate them. It would be enough if I formulate the point of law raised and express my opinion thereon. The question is whether the appellant, who is a citizen of India and is residing in the State of Kashmir, can enforce his fundamental right under Article 32 (2-A) of the Constitution by filing an appropriate writ in the High Court of Jammu & Kashmir, if his right is infringed by an order of the Union Government. The Constitution of India has been made applicable to the State of Jammu & Kashmir by the Constitution (Application to Jammu & Kashmir) Order, 1954 (Order No. 48 dated May 14, 1954) with certain exceptions and modifications. By the said Order, clause (3) of Article 32 of the Constitution was deleted, and a new clause (2-A) was inserted after clause (2). The question falls to be decided on a true construction of the said clause (2-A) which reads:

"Without prejudice to the powers conferred by clauses (1) and (2), the High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within these territories, directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them; for the enforcement of any of the rights conferred by this Part."

The operative part of this clause is in *pari materia* with Article 226 of the Constitution with the difference that the words "for any other purpose" found in the latter Article are omitted in the former. Though the power of the High Court of Jammu and Kashmir is limited to that extent, in other respects it is as extensive as that of the other High Courts under Article 226. The object of the amendment is self-evident; it was enacted to enable the said High Court to protect the fundamental rights of the citizens of India in that part of the country.

The learned Solicitor-General broadly contends that this Court has construed the analogous provisions of Article 226 of the Constitution and held that the writs under that Article do not run beyond the territories in relation to which a High Court exercises jurisdiction and that a High Court cannot issue a writ thereunder unless the person or authority against whom the writ is sought is physically resident or located within the territorial jurisdiction of that High Court; and that, therefore, on the same parity of reasoning, the High Court of Jammu and Kashmir cannot issue a writ to run beyond the territories of that State against the Union Government functioning through its officers in New Delhi.

Learned counsel for the appellant contends, on the other hand, that neither Article 32 (2-A) nor Article 226 bears any such limited construction and that on a liberal and true construction of the said constitutional provisions it must be held that the High Court can issue a writ against any Government, including the Union Government, exercising the functions within the territories of a State, if it infringes the right of a person in that State.

Before I attempt to construe the provisions of clause (2-A) of Article 32, I think it would be convenient to trace briefly the history of Article 226, for it throws a flood of light on the legislative intention expressed in Article 32 (2-A). In pre-independence India the High Courts, other than the High Courts in the presidency towns of Bombay, Calcutta and Madras, had no power to issue prerogative writs; even in the case of the said presidency High Courts the power to issue writs was very much circumscribed; their jurisdiction to issue the said writs was confined only to the limits of their original jurisdiction and the Governments were excluded from its scope. But the framers of our Constitution with the background of centuries of servility, with the awareness of the important role played by the High Court of England in protecting the rights of its citizens when they were infringed by executive action, with the knowledge of the effective and impartial part played by the High Courts in pre-independence India within the narrow limits of their jurisdiction to protect the rights of the citizens of our country, with a vision to prevent autocracy raising its ugly head in the future, declared the fundamental rights in Part III of the Constitution, conferred powers on the High Courts to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs for the enforcement of the fundamental rights or for any other purpose. In short, any person of India can approach an appropriate High Court to protect his rights against any person, authority or any Government if his fundamental right or any other right is infringed by the said person, authority or Government. If the contention of the respondents be accepted, whenever the Union Government infringes the right of a person in any remote part of the country, he must come all the way to New Delhi to enforce his right by filing a writ petition in the Circuit Bench of the Punjab High Court. If a common man residing in Kanyakumari, the southernmost part of India, is illegally detained in prison, or deprived of his propery otherwise than by law, by an order of the Union Government, it would be a travesty of fundamental rights

to expect him to come to New Delhi to seek the protection of the High Court of Punjab. This construction of the provisions of Article 226 would attribute to the framers of the Constitution an intention to confer the right on a person and to withhold from him for all practical purposes the remedy to enforce his right against the Union Government. Obviously it could not have been the intention of the Constituent Assembly to bring about such an anomalous result in respect of what they conceived to be a cherished right conferred upon the citizens of this country. In that event, the right conferred turns out to be an empty one and the object of the framers of the Constitution is literally defeated.

The scope of Article 226 vis-a-vis the reach of the High Courts' power has been considered in two decisions of this Court, namely, *Election Commission, India* v. *Saka Venkata Rao*[1] and *K. S. Rashid and Son* v. *The Income-tax Investigation Commission.*[2] As this Bench of seven Judges is constituted to enable this Court to approach the problem with a fresh mind unhampered by precedents, I propose to scrutinize the provisions of Article 32 (2-A) free from the curbs imposed by the earlier decisions.

The core of the Article is discernible in the following clause and phrases: "throughout the territories in relation to which it exercises its jurisdiction", "any Government", "within those territories", "directions or orders or writs, including writs in the nature of *habeas corpus,* etc." The words "throughout the territories, etc." delimit the territorial jurisdiction of the High Courts in the matter of issuing directions or writs. A High Court exercises jurisdiction throughout the State in which it is located. Its writs run only throughout the State and not beyond its territorial limits. The main object of the power is to keep the authorities or tribunals within their bounds and to prevent them from infringing the fundamental or other rights of citizens. At the instance of an aggrieved person it can issue one or other of the writs or orders or directions against the offending authority in respect of an act done or omitted to be done by it. It is implicit in the limitation that the impugned act must affect a person or property amenable to its territorial jurisdiction.

This question, in a different context, has been considered by the Judicial Committee of the Privy Council in *Ryots of Garabandho* v. *Zemindar of Parlakimedi.*[3] There the Board of Revenue situated in the State of Madras under section 172 of the Madras Estates Land Act, 1908, enhanced the rents payable by the ryots in three villages, including Parlakimedi village, in the district of Ganjam in the Northern Circars. The question was whether the Madras High Court had power to issue a writ to quash the order of the Board of Revenue, as the parties to that litigation were not subject to the original jurisdiction of the Madras High Court. The Judicial Committee held that the Madras High Court had no jurisdiction to issue a writ of *certiorari* to run beyond the territorial limits of that High Court. When it was contended that, as the Revenue Board was in Madras, the High Court had jurisdiction to quash its order, the Judicial Committee repelled that contention with the following remarks at page. 164:

"The Board of Revenue has always had its offices in the Presidency Town, and in the present case the Collective Board, which made the order complained of, issued this order in the town. On the other hand, the parties are not subject to the original jurisdiction of the High Court, and the estate of Parlakimedi lies in the north of the province ....Their Lordships think that the question of jurisdiction must be regarded as one of substance, and that it would not have been within the competence of the Supreme

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1. (1953) S.C.J. 293: (1953) 1 M.L.J. 702: (1953) S.C.R. 1144.

2. (1954) S.C.J. 264: (1954) S.C.R. 738.

3. (1943) 2 M.L.J. 254: I.L.R. 1944 Mad. 457: L.R. 70 I.A. 129.

Court to claim jurisdiction over such a matter as the present by issuing *certiorari* to the Board of Revenue on the strength of its location in the town. Such a view would give jurisdiction to the Supreme Court, in the matter of settlement of rents for ryoti-holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance."

This decision in clear terms lays emphasis on the substance of the matter and holds that mere physical presence of an authority within the jurisdiction of a High Court does not enable that Court to issue writs against the said authority in respect of an order made in a dispute between persons residing outside the territorial jurisdiction of the said High Court. Therefore, a High Court's jurisdiction to issue an appropriate writ depends on the co-existence of two conditions, namely, (i) the cause of action has accrued within the territories in relation to which it has jurisdiction, and (*ii*) the said authority is "within" the said territories. This interpretation may give rise to a criticism; it may be asked, which High Court could give the relief if the cause of action accrues within the territorial jurisdiction of one High Court and the authority concerned is located within that of another High Court? There may be statutory authorities with All-India jurisdiction, but for convenience located in a particular State. In exercise of the powers conferred under statutes, they may make orders affecting the rights of parties residing in different States. I am *prima facie* of the view that the said authorities, in so far as their orders operate in a particular territory, will be "within" those territories and the High Court, which exercises its jurisdiction throughout that territory, can issue a suitable writ against the said authorities. This interpretation avoids the anomaly of one High Court issuing a writ against an authority located "within" its territorial jurisdiction in respect of a cause of action accruing in another State or territory over which it has no jurisdiction. But this question does not arise in this case, for we are mainly concerned with the Union Government.

Article 226 of the Constitution is expressed in wide and most comprehensive terms. There is no difficulty about the words "person or authority", but the phrase "including any Government" gives rise to a conflict of opinion. If the framers of the Constitution intended to extend simply the power of the High Court to issue writs only against the Government of the State, they could have stated "or the Government of the State", instead they designedly used the words "any Government" which at first sight appear rather involved but on a deeper scrutiny reveal that the words "any Government" cannot mean only the Government of the State. The words "any" clearly presupposes the existence of more than one Government functioning in a State. Under the Constitution two Governments function in each State. Under Article 1, India shall be a Union of States and the territory of India shall comprise, *inter alia,* the territories of the States. Part II provides for one class of citizens, that is, citizens of India. In whatever State a person with the requisite qualifications of a citizen may reside, he is a citizen of India and not of that particular State. All the three departments of the Union as well as the State function in the State; both Parliament and the Legislature of the State make laws which govern the State in respect of matters allotted to them respectively. Both the Union and the State executive powers extend to the State, and the former is exercised in regard to matters with respect to which Parliament has power to make laws and the latter in regard to matters with respect to which the Legislature of the State has power to make laws: see Articles 73 and 162. The Judiciary consists of an hierarchy of Courts and all the Courts from the lowest to the Supreme Court exercise jurisdiction in respect of a cause of action arising in that State. The demarcation between the Union Government and the State Government is, therefore, not territorial but only subjectwise and both the Governments function within the State. With his background it is easy to perceive that "any

Government" must include the Union Government, for two State Governments cannot administer the same State, though for convenience or as a temporary arrangement, the offices of one State may be located in another State. Then it is asked why the Article confers power to issue writs against any Government only in appropriate cases. There are two answers to this question. Till the Constitution was framed there was no power in a High Court to issue a writ even against the Provincial Government. The Constitution conferred for the first time a power on the High Court to issue a writ not only against the State Government but also the Union Government. As the Union Government has sway over not only the State in question but beyond it, it became necessary to administer a caution that a writ can only be issued in appropriate cases. The High Court's jurisdiction is limited in the matter of issuing writs against the Union Government, for it cannot issue writs against it in respect of a cause of action beyond its territorial jurisdiction. There may also be a case where the secretariat of one of the State Governments is located in another State temporarily. In such a case also the High Court of the latter State cannot issue writs against that State Government as it is not appropriate to issue such writs, for the cause of action accrues within the former State.

I have, therefore, no doubt that the words "any Government" must necessarily take in the Union Government.

Much of the argument turns upon the words "within those territories". It is said that the Union Government is not within the territories of the State, for its headquarters are in Delhi. The Article does not use the word "headquarters", "resident" or "location". The dictionary meaning of the word "within" is "inside of, not out of or beyond". The connotation of the words takes colour from the context in which they are used. A person may be said to be within a territory if he resides therein. He may also be within a territory if he temporarily enters the said territory or is in the course of passing through the territory. Any authority may be in a territory if its office is located therein. It may also be said to be within a territory if it exercises its powers therein and if it can make orders to bind persons or properties therein. So too a Government may be within a State if it has a legal *situs* in that State. It may also be said to be within a State if it administers the State, though for convenience some of its executive authorities are residing outside the territory. We must give such meaning to these words as would help the working of the Constitution rather than retard it. To put it differently, can it be said that the Union Government is within a particular State? Union Government in the present context means the executive branch of the Government. Where is it located? To answer this question it is necessary to consider what is "Union Government". The Constitution in Part V under the heading "The Union" deals with separate subjects, namely, the executive, the Parliament and the Union judiciary. Under Article 53, the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 74 provides for a council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. By Article 77, all executive action of the Government of India shall be expressed to be taken in the name of the President; and clause (3) thereof authorizes the President to make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business. Article 73 says that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which

Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exerciseable by the Government of India by virtue of any treaty or agreement. The Constitution nowhere fixes the seat of the Union Government or even that of the President. Shortly stated, the Union Government is the President acting on the advice of the Ministers directly or through officers subordinate to him in accordance with the Constitution and the jurisdiction of the said Government extends, so far as is relevant to the present purpose, to matters in respect of which Parliament has power to make laws. The question that immediately arises is, what is the *situs* of such a Government? There is no statutory *situs*. For convenience of administration, the officers of such Government may stay at one place, or they may be distributed in different places; the President may reside in one place, the Prime Minister in another, the Ministers in a third place and the officers through whom the President exercises his powers in a place different from the rest. What happens when the Secretariat remains in New Delhi and the President resides for some months in a year in, say, Hyderabad? Contrary-wise, what would be the position if the President stays in New Delhi and the entire or part of the Secretariat or some of the Ministers stay in Hyderabad? It is, therefore, not possible to apply the test of residence or location in the absence of any statutory *situs*. The Union Government has no fixed legal abode; it is present throughout the territories over which it exercises jurisdiction and in respect whereof it can make effective and binding orders in the field allotted to it by the Constitution. The constitutional *situs* of the Union Government is the entire territories of the Union and it is "within" the territories of India and, therefore, within the territories of every State.

Let us look at the problem from another standpoint. Under Article 300 of the Constitution, the Government of India may sue or be sued by the name of the Union of India. The word "sued" is used in a general sense and cannot be narrowly construed in the Constitution as to comprehend only action by way of filing a suit in a civil Court. According to Webster, it means to seek justice or right by legal process. Generally speaking, it includes any action taken in a Court. The practice followed in the various High Courts and the Supreme Court is also consistent with the wide meaning attributed to it, for writs are filed against the Government of India only in the name of the Union of India. Union of India is a juristic person and it is impossible to predicate its residence in a particular place in the Union. Its presence synchronizes with the limits of the Union territories. That is the reason why that Order 27, rule 3, Code of Civil Procedure, says that in suits by or against the Government instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name as provided in section 79. Section 79 of the Civil Procedure Code is in terms analogous to Article 300 of the Constitution, and under that section,

"In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, the Union of India, and

(b) in the case of a suit by or against a State Government, the State."

As the Union of India has no statutory *situs*, Order 27, rule 3, Code of Civil Procedure, exempts its place of residence being given in the plaint or the written statement, as the case may be. The suit by or against the Union Government shall be filed in a Court which has jurisdiction to entertain such a suit, having regard to the provisions of sections 15 to 20 of the said Code.

On the same analogy, it may be held that the Union of India has no legal *situs* in a particular place and a writ petition can be filed against it in a place within the jurisdiction of the High Court wherein the cause of action accrues.

It is said that the limits of the power to issue a writ are implicit in the nature of a particular writ. What is the nature of the principal writs, namely, *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari?* The writ of *habeas corpus* "is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody". The writ of *mandamus* "is, in form, a command directed to any person, corporation or inferior Tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty." An order of prohibition is an order directed to an inferior Tribunal forbidding it to continue with the proceedings pending therein. An information in the nature of a *quo warranto* lies against a person who claimed or usurped an office, franchise, or liberty, to inquire by what authority he supported his claim. A *certiorari* is directed to an authority "requiring the record of the proceedings in some cause or matter to be transmitted into the High Court to be dealt with there." (*See* Halsbury's Law of England, Vol. II, 3rd edition).

It was asked how could the liberty of a subject be secured, the command be issued, the proceedings of an inquiry be prohibited, the credentials of a person to hold office be questioned, the records of a proceeding be directed to be transmitted to the High Court, if the authority concerned was located, or the person directed resided, outside the territorial jurisdiction of the High Court? It was also asked how, if the said authority, or person, disobeyed the order of the High Court, it could be enforced against the said authority or person. On the parity of the same reasoning the argument proceeded that, as the officers acting for the Government of India reside in Delhi, a writ which would become *brutum fulmen* could not be issued by the High Court.

The questions so posed are based on a misapprehension of the relevant provisions of the Constitution. They also mix up the nature of the writs with the procedure in dealing with the writs or enforcing the orders made therein. As I have already indicated, the Article confers a power on the High Court to issue writs against the Union Government. If the said Government is "within the State," is it an answer to it that an officer of the Government dealing with a particular paper or papers is residing outside the territorial jurisdiction of the High Court? If the Union Government is bound by the order of the High Court, the question of service of notice on a particular officer acting for the Government or to enforce an order against him is a matter pertaining to the realm of procedure and appropriate rules can be framed by the High Court or the requisite law made by the Parliament. If the Union Government disobeys the order it would certainly be liable for contempt of Court under the Contempt of Courts Act, 1952. Even if the contemner happens to be an officer of the said Government residing outside the territorial limits of the High Court, the High Court has ample power to reach him under section 5 of the said Act.

The analogy drawn from English law is rather misleading. England is comparatively a small country and it has only one Government functioning throughout the State. The problem that has arisen now could not have arisen in England, for the jurisdiction of the Queen's Bench Division of the High

Court extends throughout England. In England the manner of the exercise of the jurisdiction was also regulated by a procedure brimming with technicalities, but later on simplified by statute. The framers of our Constitution therefore designedly used the words "in the nature of" indicating that they were not incorporating in the Constitution the entire procedure followed in England, for the procedure will have to be evolved having regard to the federal structure of our Government. How can the procedural law of England in the matter of writs be bodily lifted and implanted in India? This Court shall have to put a reasonable construction on the words without being unduly weighed down by the historical background of these writs and construe the Article in such a way, if legally permissible, to carry out the intention of the Constitution-makers. That apart, Article 226 of the Constitution is not confined to the prerogative writs in vogue in England. The Article enables the appropriate High Court to issue also directions or orders, and there is no reason why the High Court could not, in an appropriate case, give a suitable direction to, or make a proper order on, the Union Government. Such directions or orders are certainly free from the procedural technicalities of the said writs.

I shall now notice briefly the decisions cited at the Bar. The first is the decision of this Court in *Election Commission, India* v. *Saka Venkata Rao.*[1] There the Governor of Madras referred to the Election Commission, which had its offices permanently located in New Delhi, the question whether the respondent was disqualified and could be allowed to sit and vote in the Assembly. The respondent thereupon applied to the High Court of Madras under Article 226 of the Constitution for a writ restraining the Election Commission from enquiring into his alleged disqualification for membership of the Assembly. This Court held that the power of the High Court to issue writs under Article 226 of the Constitution was subject to the two-fold limitation: (*i*) that such writs cannot run beyond the territories subject to its jurisdiction; and (*ii*) that the person or authority to whom the High Court is empowered to issue writs must be amenable to the jurisdiction of the High Court either by residence or location within the territories subject to its jurisdiction. On that basis the writ petition was dismissed. At the outset it may be noticed that there is one obvious difference between that case and the present one. In that case the respondent was not the Union of India but an authority which could have and had its location in a place outside the Madras State. The present case satisfies both the conditions: the writ does not run beyond the territorial jurisdiction of the High Court, as the Union Government must be deemed to be "within" the said territories; the second condition is also satisfied, as the Union Government, being within the State, is also amenable to its jurisdiction.

The next case relied upon by the learned Solicitor-General is a converse one. It is the decision of this Court in *K. S. Rashid & Son* v. *The Income-tax Investigation Commission.*[2] In that case the Income-tax Investigation Commission located in Delhi was investigating the case of the petitioners under section 5 of the Taxation on Income (Investigation Commission) Act, 1947, although the petitioners were assessees belonging to Uttar Pradesh and their original assessments were made by the Income-tax authorities of that State. It was contended that the Punjab High Court had no jurisdiction to issue a writ under Article 226 of the Constitution to the said Commission. This Court,

1. (1953) S.C.J. 293 : (1953) 1 M.L.J. 702 ; (1953) S.C.R. 1144.
2. (1954) S.C.J. 264 : (1954) S.C.R. 738.

after restating the two limitations on the power of the High Court to issue a writ, held that the Commission was amenable to the jurisdiction of the Punjab High Court and, therefore, the Punjab High Court had jurisdiction to issue the writ. This decision also deals with a case of statutory authority located in Delhi and it has no application to the case of the Union Government. The question whether the principles that apply to the Government of India would equally apply to statutory authorities situate in one State but exercising jurisdiction in another, does not arise for consideration in this case; though, as I have already expressed, I am *prima facie* of the view that there is no reason why they should not.

Now coming to the decision of the High Courts, there is a clear enunciation of the relevant principles in *Maqbul-Un-Nissa* v. *Union of India*.[1] The Full Bench of the Allahabad High Court directly decided the point now raised before us. The importance of the decision lies in the fact that the learned Judges approached the problem without being oppressed by the decision of this Court in *Saka Venkata Rao's case*,[2] which was decided only subsequent to that decision. After considering the relevant Articles of the Constitution, Sapru, J., speaking for the Full Bench, observed at pages. 293-294 thus:

"The analogy between a Government and a corporation or a joint stock company which has its domicile in the place where its head office is situate is misleading. To hold that the jurisdiction of this Court does not extend to the Union Government as it has its capital at Delhi and must be deemed to have its domicile at Delhi would be to place the Union Government not only in respect of the rights conceded in Part III but for any other purpose also beyond the jurisdiction of all State High Courts except the Punjab High Court."

The learned Judge proceeded to state at page 294:

"In our opinion, the jurisdiction of this Court to intervene under Article 226 depends not upon where the Headquarters or the Capital of the Government is situate but upon the fact of the effect of the act done by Government, whether Union or State being within the territorial limits of this Court."

Adverting to the words "any Government" in Article 226, the learned Judge observed at page. 292 thus:

"They indicate that the founding fathers knew that more than one Government would function within the same territory."

I entirely agree with the observations of the learned Judge, for they not only correctly construe the provisions of Article 226 but also give effect to the intention of the Constitution-makers.

After the decision of this Court in *Saka Venkata Rao's case*,[2] the High Court of Madhya Pradesh considered the question in *Surajmal* v. *State of M.P.*[3] There, the Central Government rejected an application for a mining lease and the order rejecting the application was communicated to the applicant who was residing in the State of Madhya Pradesh. It was held by the High Court that the writ asked for could not be issued so as to bind the Central Government because, "(*a*) the Central Government could not be deemed to be permanently located or normally carrying on its business within the jurisdiction of the High Court; (*b*) the record of the case which the Central Government decided was not before the High Court and could not be made availalbe from any legal custody within the State; (*c*) the order of the State Government must be deemed to have merged in that of the Central Government; (*d*) the order of the State Government could not be touched unless the order of the Central Government could be

1. I.L.R. (1953) 2 All. 289.
2. 1953 S.C.J. 293 : (1953) 1 M.L.J. 702 : 1953 S.C.R. 1144.
3. A.I.R. 1958 M.P. 103.

be brought before the High Court and quashed." We are concerned here with the first and second grounds. The learned Chief Justice, who delivered the judgment on behalf of the Full Bench applied the principle of the decision of this Court in *Saka Venkata Rao's case*[1], to the Union Government; and for the reasons already mentioned I am of opinion that the decision is not applicable to the case of the Union Government. The second reason in effect places the procedure on a higher pedestal than the substantive law. It is true that in a writ of *certiorari* the records would be called for; but, if once it is held that the Union Government is within the State within the meaning of Article 226 of the Constitution, I do not think why the High Court in exercise of its constitutional power cannot direct the Union Government to bring the records wherever its officers might have kept them. This second ground is really corrollary to the first, *viz.*, that the Union Government is not within the territorial jurisdiction of the High Court concerned.

The Bombay High Court in *Radheshyam Makhanlal* v. *The Union of India*,[2] also held that a writ cannot issue against the Union Government whose office is located outside the territorial jurisdiction of the High Court. Shah, J., applying the principle of the decision in *Saka Venkata Rao's case*[1], to the Union Government held that as the office of the Union Government was not located within the State of Bombay, the Bombay High Court could not issue a writ to the Union Government. But S. T. Desai, J., was not willing to go so far, and he based his conclusion on a narrower ground, namely, that even if the writ was issued it could not be enforced. I have already pointed out that both the grounds are not tenable. The Union Government is within the State of Bombay in so far as it execises its powers in that State and the High Court has got a constitutional power to issue writs to the Union Government and, therefore, their enforceability does not depend upon its officers residing in a particular place.

The foregoing discussion may be summed up in the following propositions: (1) The power of the High Court under Article 226 of the Constitution is of the widest amplitude and it is not confined only to issuing of writs in the nature of *habeas corpus*, etc., for it can also issue directions or orders against any person or authority, including in appropriate cases any Government. (2) The intention of the framers of the Constitution is clear, and they used in the Article words "any Government" which in their ordinary significance must include the Union Government. (3) The High Court can issue a writ to run throughout the territories in relation to which it exercises jurisdiction and to the person or authority or Government within the said terrtories. (4) The Union Government has no constitutional *situs* in a particular place, but it exercises its executive powers in respect of matters to which Parliament has power to make laws and the power in this regard is exercisable throughout India; the Union Government must, therefore, be deemed in law to have functional existence throughout India. (5) When by exercise of its powers the Union Government makes an order infringing the legal right or interest of a person residing within the territories in relation to which a particular High Court exercises jurisdiction, that High Court can issue a writ to the Union Government, for in law it must be deemed to be "within" that State also. (6) The High Court by issuing a writ against the Union Government is not travelling beyond its territorial jurisdiction, as the order is issued against the said Government "within" the State. (7) The fact that for the sake of convenience a particular officer of the said Government issuing an order stays outside the territorial limits of the High Court is not of any relevance, for it is the Union Government that will have to produce the

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1. (1953) S.C.J. 293 : (1953) 1 M.L.J. 702 : (1935) S.C.R. 1144.
2. A.I.R. 1960 Bom. 353.

record or carry out the order, as the case may be. (8) The orders issued by the High Court can certainly be enforced against the Union Government, as it is amenable to its jurisdiction, and if they are disobeyed it will be liable to contempt. (9) Even if the officers physically reside outside its territorial jurisdiction, the High Court can always reach them under the Contempt of Courts Act, if they choose to disobey the orders validly passed against the Union Government which cannot easily be visualized or ordinarily be expected. (10) The difficulties in communicating the orders pertain to the rules of procedure and adequate and appropriate rules can be made for communicating the same to the Central Government or its officers.

For the aforesaid reasons, I hold that Article 32 (2-A) of the Constitution enable the High Court of Jammu and Kashmir to issue the writ to the Union Government in respect of the act done by it infringing the fundamental rights of the parties in the State.

In the result, I allow the appeal, set aside the order of the High Court and direct it to dispose of the matter in accordance with law. The appellant will have his costs.

Das Gupta, J.—I have had the advantage of reading the judgments prepared by my Lord the Chief Justice and Mr. Justice Subba Rao. I agree with the conclusions reached by the Chief Justice that the appeal should be dismissed. As, however, I have reached that conclusion by a slightly different process of reasoning I propose to indicate those reasons briefly.

The facts have been fully stated in the judgment of my Lord the Chief Justice and it is not necessary to repeat them. It is sufficient to state that the appellant filed an application to the High Court of Jammu and Kashmir under Article 32 (2-A) of the Constitution for the issue of an appropriate writ, order or directions restraining the Union of India and the State of Jammu and Kashmir from enforcing an order conveyed in the Government of India's latter, dated July 31, 1954, whereby the Government of India ordered the premature compulsory retirement of the appellant with effect from August 12, 1954. A preliminary objection was raised on behalf of the respondents that Government of India is not a Government within the territorial limits of the jurisdiction of the Jammu and Kashmir High Court and so the application was not maintainable. The High Court accepted this objection as valid and dismissed the application. The sole question in controversy in appeal is whether the High Court had jurisdiction, on the facts and circumstances of this case, to issue a writ to the Government of India under Article 32 (2-A) of the Constitution.

Article 32 (2-A) of the Constitution under which the appellant asked the High Court for relief is in the following words:—

> "Without prejudice to the powers conferred by clauses (1) and (2), the High Court shall have power, throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within those territories, directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari*, or, any of them; for the enforcement of any of the rights conferred by this Part."

Except for the fact that "the High Court" in this Article means only the High Court of the State of Jammu and Kashmir while Article 226 of the Constitution refers to all other High Courts and the further fact that power granted by this Article is for the enforcement of only of the rights conferred by Part III of the Constitution while Article 226 gives power to the High Courts in the Union for the enforcement not only of the rights conferred by Part III but for any other purpose, the provisions of the two Articles are exactly the same. Power is given to the High Court to give relief in certain matters by issuing

appropriate writs and orders to (1) any person; (2) any authority other than the Government and (3) any Government. The exercise of this power is subject to the existence of the condition precedent that the person or the Government or the authority other than the Government must be "within the territories in relation to which the High Court exercises jurisdiction". A special limitation in respect of the issue of writs or orders to a Government is introduced by the words "in appropriate cases" before the words "any Government". Leaving for later consideration the effect of the words "in appropriate cases" we have first to examine the question: when is a Government within the territories under the jurisdiction of a particular High Court? On behalf of the first respondent, the Union of India, it is urged that to be within the territories under the jurisdiction of a High Court the Government must be located within those territories. It is pointed out that "any person" to be within any specified territories has to be present within those territories; an authority other than Government has also, before it can be said to be within any particular territories, a physical existence within those territories by having its office therein. The same requirement of location within the particular territories, it is argued, should apply to the case of Governments. The argument is no doubt attractive and at first sight even plausible. On closer examination however it becomes evident that this argument oversimplifies the problem by slurring over the fallacious assumption that a Government has a location in the same way as any person or any authority other than Government. Has the Government any location in a similar sense—in the same way as a person has a location at any point of time by being present at a particular place or an authority other than the Government can be said to be located at the place where its office is situated? There is no doubt that when we think of a Government, whether of the States or of the Union we are thinking of the executive organ of the State. The executive power of the Union is under Article 53 vested in the President and is to be exercised by him. The executive power of the States is vested in the Governors of the States and has to be exercised by them. Does it follow however that the Government of India is located at the place where the President resides and similarly the Government of each State is located at the place where the Governor resides? It has to be noticed that while the Constitution contains specific provisions in Article 130 as to where the Supreme Court shall sit, no such provision is made as to where the President of India shall reside or exercise his executive power vested in him. Article 231 of the Constitution speaks of a principal seat for the High Courts of each State. We search in vain however for any mention of any principal seat "for the President of India or the Governors of the States". The fact that the President of India has a special place of residence, the Rashtrapati Bhawan in Delhi and the Governors of States have also special places of residence at some places in the State known as Raj Bhavan, is apt to make us forget that the Constitution does not provide for any place of residence for the President or Governors. There is nothing to prevent the President of India from having more than one permanent place of residence within the Union. If this happens and places of residence are provided for the President of India in, say, Bombay, Calcutta and Madras in addition to the residence at Delhi, can it be said that the Government of India is located in Delhi when the President of India resides in Delhi, it goes to Calcutta when he resides in Calcutta, it goes to Bombay when the President resides in Bombay and to Madras when the President goes and resides in Madras? This may seem at first sight a fantastic illustration; but when we remember that in fact in the days of British rule, the Viceroy had a permanent place of residence at Simla for part of the year and another permanent place of residence at Calcutta for part of the year before 1911 and after 1911 one permanent place of residence in Delhi and

another in Simla, it is easy to see that what has been said above by way of illustration is by no means improbable. If therefore a Government is to be held to be located at the place where the head of the State—the President of India in the case of the Government of India and the Governor in the case of each State —resides, it may well become impossible to speak of any particular place as the place where the Government is located throughout the year. This may not affect the question of any State Government being within the territories of the High Court of the State. For whatever place the Governor may have for his residence is bound to be within the territories of the State. The position will however become wholly uncertain and difficult as regards the Government of India being within the territorial jurisdiction of any particular High Court. For part of the year it may be, if the residence of the President be the criterion for ascertaining the location of the Government, that the Government of India will be within the territories of one High Court and for other parts of the year in another High Court. It will be wholly unreasonable therefore to accept the test of residence of the President of India for deciding where the Government of India is located.

Finding the test of the President's residence illusory, one may try to say that the Government of India or of a State is situated at the place where the offices of the Ministry are situated. Under Article 77 the President allocates the business of the Government of India among the Ministers while under Article 166 the Governor of a State allocates the business of the Government of a State—except business with respect to which the Governor is required to act in his discretion—among the Ministers of the State. If therefore it was correct to say that all the Ministers of the Government of India had to perform their functions in respect of the business allocated to them at one particular place, it might be reasonable to say that the Government of India is located at that place. Similarly if all the Ministers of a State had to perform their functions in respect of the business allocated to them at one particular place the Government of the State might well be said to be located at that place. The Constitution however contains no provision that all the Ministers of a State shall perform their function at one particular place in the State nor that the Ministers of the Union will perform their functions at one particular place in the State. Situations may arise not only in an emergency, but even in normal times, when some Ministers of the Government may find it necessary and desirable to dispose of the business allocated to them at places different from where the rest of the Ministers are doing so. The rehabilitation of refugees from Pakistan is part of the business of the Government of India and for the proper performance of this business there is a Ministry of Rehabilitation for Refugees. It is well-known that the Minister in this Ministry has to perform a great portion of his business at Calcutta in West Bengal and stays there for a considerable part of the year. Many of the offices of this Ministry are situated in Calcutta. What is true of this Ministry, may happen as regards other Ministries also. Special circumstances may require that some portion of the business of the Ministry of Commerce be performed at places like Bombay, Calcutta or Madras in preference to Delhi, and if this happens the Minister to whom the business of Government of India in respect of commerce has been allocated will be transacting his business at these places instead of at Delhi. If public interest requires that the greater portion of the business of the Ministry of Defence should for reasons of security or other reasons be carried on at some place away from Delhi the Defence Minister will have to transact its business at that place. It is clear therefore that while at any particular point of time it may be possible to speak of any Ministry of the Government of India being located at a particular place, the

Government of India as a whole may not necessarily be located at that place. In my opinion, it is therefore neither correct nor appropriate to speak of location of any Government. Nor is it possible to find any other satisfactory test for ascertaining the location of the Government of India.

In *Election Commission* v. *Saka Venkata Subba Rao*,[1] this Court held that before a writ under Article 226 could issue to an authority, the authority must be located within the territories under the jurisdiction of the High Court. There however the Court was not concerned with the case of any Government, and had no occasion to consider whether a Government could be said to have a location. The decision in that case and in the later case of *K. S. Rashid & Son* v. *The Income-tax Investigation Commission, etc.*,[2] does not therefore bind us to hold that a Government has a location in the same way as an authority like an Election Commission or an Income-tax Investigation Commission. It appears reasonable therefore to hold that all that is required to satisfy the condition of a Government being within the territories under the jurisdiction of a High Court is that the Government must be functioning within those territories. The Government of India functions throughout the territory of India. The conclusion cannot therefore be resisted that the Government of India is within the territories under the jurisdiction of every High Court including the High Court of Jammu and Kashmir.

The use of the words "any Government" appears to me to be an additional reason for thinking that the Government of India is within the territories under the jurisdiction of the Jammu & Kashmir High Court. "Any Government" in the context cannot but mean every Government. If the location test were to be applied the only Government within the territories of the State of Jammu and Kashmir would be the Government of Jammu and Kashmir. It would be meaningless then to give the High Court the power to give relief against "any Government" within its territories. These words "any Government" were used because the Constitution-makers intended that the High Court shall have power to give relief against the Government of India also.

But, contends the respondent. that will produce an intolerable position which the Constitution-makers could not have contemplated. The result of the Government of India being within the territories of every High Court in India, will, it is said, be that the Government of India would be subjected to writs and orders of every High Court in India. A person seeking relief against the Government of India will naturally choose the High Court which is most convenient to him and so the Government of India may have to face applications for relief as against the same order affecting a number of persons in all the different High Courts in India. If a position of such inconvenience to the Government of India, though of great convenience to the persons seeking relief, did in fact result from the words used by the Constitution-makers, I for one, would refuse to shrink from the proper interpretation of the words merely to help the Government. I do not however think that that result follows. For, on a proper reading of the words "in appropriate cases", it seems to me that there will be, for every act or omission in respect of which relief can be claimed, only one High Court that can exercise jurisdiction.

It has first to be noticed that the limitation introduced by the use of these words "in appropriate cases" has not been placed in respect of issue of writs

1. (1953) S.C.J. 293: (1953) 1 M.L.J. 702: (1953) S.C.R. 1144.

2. (1954) S.C.J. 264: (1954) S.C.R. 738.

to persons and to authorities other than Government. It has been suggested that the effect of these words is that in issuing writs against any Government the High Court has not got the same freedom as it has when issuing writs against any person or authority other than Government and that when relief is asked against a Government the High Court has to take special care to see that writs are not issued indiscriminately but only in proper cases. I have no hesitation in rejecting this suggestion. It cannot be seriously contemplated for a moment that the Constitution-makers intended to lay down different standards for the Courts when the relief is asked for against the Government from when the relief is asked for against other authorities. In every case where relief under Article 226 is sought the High Court has the duty to exercise its discretion whether relief should be given or not. It is equally clear that in exercising such discretion the High Court will give relief only in proper cases and not in cases where the relief should not be granted.

Why then were these words "in appropriate cases" used at all? It seems to me that the Constitution-makers being conscious of the difficulties that would arise if all the High Courts in the country were given jurisdiction to issue writs against the Central Government on the ground that the Central Government was functioning within its territories wanted to give such jurisdiction only to that High Court where the act or omission in respect of which relief was sought had taken place. In every case where relief is sought under Article 226 it would be possible to ascertain the place where the act complained of was performed or when the relief is sought against an omission, the place where the act ought to have been performed. Once this place is ascertained the High Court which exercises jurisdiction over that place is the only High Court which has jurisdiction to give relief under Article 226. That, in my view, is the necessary result of the words "in appropriate cases".

On behalf of the appellant it was contended on the authority of the decision of the Privy Council in *Ryots of Garabandho and other villages* v. *Zemindar of Parlakimedi and another*[1] that all that is necessary to give jurisdiction to a High Court to act under Art. 226 is that a part of the cause of action has arisen within the territories in relation to which it exercises jurisdiction. The question whether the cause of action attracts jurisdiction for relief under Article 226 of the Constitution as in the case of suits was considered by this Court in *Saka Venkata Subba Rao's case*[2] and the answer given was in the negative. Referring to the decision of the Privy Council in *Parlakimedi's case,*[1] this Court pointed out that the decision did not turn on the construction of a statutory provision similar in scope, purpose or wording to Article 226 of the Constitution, and is not of much assistance in the construction of that article. Delivering the judgment of the Court Patanjali Sastri, C. J., also observed:—

> "The rule that cause of action attracts jurisdiction in suits is based on statutory enactment and cannot apply to writs issuable under Art. 226 which makes no reference to any cause of action or where it arises but insists on the presence of the person or authority 'within the territories' in relation to which the High Court exercises jurisdiction."

This decision is binding on us, and I may respectfully add that I find no reason to doubt its correctness.

It is true that in that case the Court had to consider the question of jurisdiction in respect of an authority other than Government. It is difficult to

1. (1943) 2 M.L.J. 254: L.R. 70 I.A. 129: I.L.R. (1944) Mad. 457 (P.C.).

2. (1953) S.C.J. 293: (1953) 1 M.L.J. 702: (1953) S.C.R. 1144.

see however why if cause of action could not attract jurisdiction against persons and authorities other than Government it would attract jurisdiction as against a Government. It seems to me clear that the principle of basing jurisdiction on cause of action has not been introduced in the Constitution under Article 226 or Article 32 (2-A) of the Constitution.

It may seem at first sight that to hold that the High Court within whose jurisdiction the action or omission, complained of took place will have jurisdiction, is in effect to accept the accrual of cause of action as the basis of jurisdiction. This however is not correct. The High Court within the jurisdiction of which the act or omission takes place, has jurisdiction, not because a part of the cause of action arose there, but in consequence of the use of the words "in appropriate cases".

The several cases in the High Court in which the question now before us has been considered have been referred to in the majority judgment and also in the judgment of Mr. Justice Subba Rao and no useful purpose would be served in discussing them over again.

For the reasons discussed above I have reached the conclusion that while the Government of India is within the territories of every High Court in India the only High Court which has jurisdiction to issue a writ or order or directions under Article 226 or Article 32 (2-A) against it is the one within the territories under which the act or omission against which relief was sought took place.

In the present case the act against which the relief has been sought was clearly performed at Delhi which is within the territories under the jurisdiction of the Punjab High Court and the Jammu and Kashmir High Court cannot therefore exercise its jurisdiction under Article 226.

In the result, I agree with my Lord the Chief Justice that the appeal should be dismissed with costs.

ORDER

In accordance with the opinion of the majority of the Court, this appeal is dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR, K. N. WANCHOO, K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.

The General Manager, Southern Railway, The Personnel Officer (Reservation), Southern Railway .. *Appellants**

v.

Rangachari .. *Respondent*,

Gurbux Das .. *Intervener*.

Constitution of India (1950), *Article* 16 (4)—*Scope and effect—Promotion to selection post—If covered by Article* 16 (4)—*Article* 16 (1) *and* (2)—*Scope—Circular by Railway Board, dated* 27*th April*, 1959, *directing reservation for Scheduled Castes and Scheduled Tribes candidates for promotion to selection-posts—Constitutional validity*.

What Article 16 (1) of the Constitution guarantees is equality of opportunity to all citizens in respect of all the matters relating to employment (including provisions as to salary, increments, leave, gratuity, pension, age of superannuation, etc.)

Article 16 (1) and (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment, and even in regard to such a promotion to a selection post all that Article 16 (1) guarantees is equality of opportunity to all citizens who enter service.

Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16 (1). The words in respect of any employment in Article 16 (2) must, therefore, include all matters relating to employment as specified in Article 16 (1). Promotion to selection posts is included both under Article 16 (1) and (2).

Article 16 (4) must be construed on the basis that both " appointments " and " posts " to which its operative clause refers are appointments and posts in the services under the State. The word " post " cannot mean *ex cadre* post. The power of reservation which is conferred on the State under Article 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts.

The circulars issued by the Railway Board , dated 27th April, 1959, directing reservation for Scheduled Castes and Scheduled Tribes candidates for promotion to selection posts are within the scope of Article 16 (4) and their validity is not open to challenge.

Per *Wanchoo and Rajagopala Ayyangar, JJ.*(dissenting).—Giving the words used in Article 16 (4), as liberal an interpretation as is possible without destroying or making illusory the fundamental right guaranteed in Article 16 (1) to which Article 16 (4) is in the nature of an exception or a proviso, Article 16 (4) can only mean that the State has the power thereunder to reserve numerically a certain percentage of appointments or posts and it has no power to split the service into various grades which might exist in it and make reservation in each grade because of the use of the word " posts ", therein.

Per *Rajagopala Ayyangar, J.*—Under Article 16 (4) the State is entitled to make provision for the reservation of appointments if in their opinion certain backward classes of citizens are not adequately represented in the service. The Article contemplates action in relation to and having effect in the future when once the State forms the opinion about the inadequacy of the service. To give retrospective effect to the reservation as the impugned notification has done would be to redress an inadequate representation which took place in the past by an order issued today. That is not contemplated by the power conferred to reserve which can only mean for the future.

Appeal from the Judgment and Order, dated the 3rd March, 1960, of the Madras High Court, in W. P. No. 1051 of 1959.

N. C. Chatterjee, Senior Advocate (*B. R. L. Iyengar, T. M. Sen* and *D. Gupta*, Advocates, with him), for Appellants.

S. Mohan Kumaramangalam, Senior Advocate (*M. K. Ramamurthy, R. K. Garg* and *T. S. Venkataraman*, Advocates, with him), for Respondent and the Intervener.

The Court delivered the following Judgments:

Gajendragadkar, J. (On behalf of the Majority)—On a writ petition filed by the respondent K. Rangachari in the Madras High Court under Article 226 of the Consti-

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* Civil Appeal No. 341 of 1960. 28th April, 1961.

tution a writ of *mandamus* has been issued by the said High Court restraining the appellants, the General Manager, Southern Railway, and the Personnel Officer (Reservation), Southern Railway, from giving effect to the directions of the Railway Board ordering reservation of selection posts in Class III of the railway service in favour of the members of the Scheduled Castes and Scheduled Tribes and in particular the reservation of selection posts among the Court Inspectors in Class III one of which is held by the respondent. After the writ was thus issued the appellant applied for and obtained a certificate from the said High Court under Article 132 (1) of the Constitution as it involved a substantial question of law, namely, the scope of Article 16 (4) of the Constitution. It is with this certificate that the appeal has been brought to this Court, and the only question which it raises for our decision is about the scope and effect of Article 16 (4). This question is of considerable public importance though the dispute raised by it lies within a very narrow compass.

In the railway services there are four grades of Court Inspectors included in class III, (1) Court Inspectors on Rs. 200—300, (2) Court Inspectors Rs. 260—350, (3) Chief Court Inspectors on Rs. 300—400, and (4) Chief Court Inspectors on Rs. 360—500. It appears that Inspectors of the first category are recruited partly directly and partly by selection from other *categories* of railway services. To the remaining three grades appointments are made by promotion and they are classified as selection posts. Selection to these grades is made by a committee of officers constituted for the purpose. In respect of non-selection posts seniority in service is the qualification but in regard to selection posts seniority is only one of the qualifications for promotion to such posts ; suitability to promotion is considered on other relevant grounds as well.

The respondent was initially recruited to the grade of Rs. 200-300 and was confirmed in that grade on November 21, 1956. Between May 23, 1958 and August 22, 1958 as well as between December 8, 1958 and December 31, 1958 he was promoted to officiate in the grade of Rs. 260-350. He got a chance of another similar promotion to officiate on April 8, 1959. These promotions were in the nature of *ad hoc* promotions and were consequently of temporary duration. Later, on June 16, 1959 he was interviewed by the selection committee and his promotion to the said higher grade was regularised and an order was passed in that behalf on June 30, 1959. By this order he was allowed to continue to officiate in the said grade. Since then he has been officiating in that grade.

On April 27, 1959 and on June 12, 1959 the two impugned circulars were issued by the Railway Board and addressed to the General Managers. As a result of the said circulars the selection committee decided to consider the case of Hiriyanna for promotion to the grade of Rs. 260-350, Hiriyanna being a member of the Scheduled Caste. The record shows that at the time when the respondent was interviewed and selected he was placed as Number One by the selection committee and one Parthasarthy was placed as Number Two. On the said occasion Hiriyanna was not selected and put in the panel. The selection committee desired to examine the case of Hiriyanna in order to decide whether he was suitable for promotion to higher grade in the light of the two directives issued by the Railway Board and so a meeting of the selection committee was called on November 18, 1959. The respondent thought that the proceedings of the said proposed meeting may result prejudicially to his interest and so on November 16, 1959 he filed the present Writ Petition No. 1051 of 1959. In this petition he applied for a writ in the nature of *mandamus* and also prayed for an interim injunction restraining the holding of the meeting of the selection committee proposed to be held on November 18, 1959. An interim injunction as prayed for by the respondent was issued by the High Court and in consequence the proposed meeting has not been held.

According to the respondent the two directives issued by the appellants under the two impugned circulars were *ultra vires*, illegal, inoperative and unconstitutional in that they were not justified by Article 16 (4). He alleged that a reading of Articles 16, 335, 338, and 339 would show that Constitution draws a clear distinc-

tion between Scheduled Castes or Tribes on the one hand and backward classes on the other and so it was urged by him that the impugned circulars were illegal. The petition further urged that the safeguard provided by Article 16 (4) applied only to reservation of posts at the stage of appointment and not for reservation of posts for promotion after appointment and so the circulars were outside the provisions of Article 16 (4) and as such contravened Article 16 (1). The petition expressed the apprehension that if the circulars are implemented the respondent would be reverted and that would cause great loss both financially and in status to him. It is on these allegations that the respondent prayed for the issue of a writ in the nature of *mandamus* directing the appellants to forbear from implementing the two impugned circulars.

These pleas were denied by the appellants. It was alleged by them that the expression " backward class " appearing in Article 16 (4) would include not only the Scheduled Castes and Scheduled Tribes but all backward communities who could not stand on their own legs. Therefore the reservations made by the impugned circulars were fully covered by Article 16 (4). The apellants' case was that the safeguards provided by Article 16 (4) would extend not only to initial appointments but also to promotions made by selection and that clearly brought the impugned circulars within the protection of Article 16 (4). The appellants categorically denied that the respondent would suffer any loss or prejudice because persons who had already been promoted on the basis of earlier regular selections were not intended to be reverted as a consequence of the implementation of the impugned circulars. According to the appellants the petition filed by the respondent was premature and on the merits no case had been made out for the issue of a writ of *mandamus*.

At this stage it would be material to set out the relevant portions of the impugned circulars. The circular issued by the Railway Board on April, 27, 1959 contained, *inter alia*, the following directions:

" There are different grades of Class III posts. Some of these posts are ' non-selection ' posts, promotion to which is made on ' seniority-cum-suitablility ' basis, while in the case of others which are ' Selection ' posts, promotion is made by a positive act of selection. There will be no quota for Scheduled Castes and Scheduled Tribes candidates in respect of promotion to ' non-seclection ' posts.

For promotion to ' Selection ' posts, however, there will be the prescribed quota of reservation. The field of consideration in the case of Scheduled Castes and Scheduled Tribes candidates should be four times the number of posts reserved without any condition of qualifying period of service in their case, subject to the condition that consideration should not normally extend to such staff beyond two grades immediately below the grade for which selection is held. "

There is one more direction given by the said circular which must be read. The decision of the Railway Board providing reservation for Scheduled Castes and Scheduled Tribes in promotion vacancies as laid down above comes into effect from January 4, 1957. It will, therefore, be necessary to calculate the number of posts that should have been made available to the Scheduled Castes and Scheduled Tribes during 1957 and 1958 and these should be carried forward to be filled in 1959. Thus it would be noticed that the effect of this circular was to prescribe a quota of reservation for selection posts and to give effect to this reservation retrospectively from January 4, 1957. In a sense it is this retrospective operation of the circular which appears to be the main cause of the present dispute.

On June 12, 1959, another circular was issued giving guidance and directions as to how the earlier circular should be implemented. This circular directed, *inter alia*, by Paragraphs 2 (ii) and 2 (iii) as follows :

" 2 (ii) The Special Rosters in force for S.C. & S.T. in direct recruitment categories are to be followed to work out the number of posts to be reserved for S.C. & S.T. in promotions made in Selection Grades and for promotion from Class IV to Class III.

2 (iii) As the Board's orders have retrospective effect from 4th January, 1957, it is necessary that the promotions made in each selection grade on your Division/Office from 4th January, 1957 are reviewed and the number of posts due to S.C. & S.T. worked out applying the Roster referred to in item (ii) above. "

It appears certain doubts were raised in regard to the manner in which the reservation circulars had to be implemented and so on 11th September, 1959 the Railway Board issued a letter clarifying the doubts raised. One of the points thus clarified was whether the instructions issued in the Board's letter contemplated reversion of staff already promoted to selection posts after 4th January, 1957 to accommodate S.Cs. and S. Ts. (which stand for Scheduled Castes and Scheduled Tribes) according to percentage basis. The clarification issued was that the said orders did not contemplate such reversion. It was, however, desired that the shortfalls should be made good against the existing as well as the furture vacancies. It is by virtue of this clarification that the respondent was assured by the appellants during the proceedings before the High Court that he need not entertain any apprehension of reversion as a result of the implementation of the impugned circulars.

We would now breifly summarise the findings and conclusions of the High Court on the points raised before it by the contentions of the parties in the present writ proceedings. The High Court has found that the equality of opportunity guaranteed by Article 16 (1) and the prohibition against discrimination embodied in Article 16 (2) apply also to promotions of civil servants from one post to another when both are included in the same service. It was clearly of opinoion that promotions are within the ambit of clauses (1) and (2) of Article 16. The High Court rejected the respondent's contention that the Scheduled Castes and Tribes did not belong to backward classes and so it held that the expression " backward class " in Article 16 (4) includes members of the Schedules Castes and Scheduled Tribes. The High Court, however, was inclined to take the view that the expressions " appointments " or " posts " are virtually terms of art which have to be interpreted and understood in the light of the legislative history of the constitutional enactments that preceded the Constitution, and thus construed it came to the conclusion that " posts " in Article 16 (4) are confined to civil posts other than civil posts included in any of the civil services. Appointment to a specified service, according to the High Court, can take place only once in the case of every person and so promotions could not be denoted by the word " appointments " and " posts " were outside service posts, and so promotion to posts inside the service could not be said to be covered by Article 16 (4). It appears from the jugdment of the High Court that if the word " posts " had been construed by the High Court as including posts in civil services then it might have come to a different conclusion on the question about the validity of the impugned circulars. It, however, held that the word " posts " was a term of art and it definitely excluded the posts in civil services. That is how the High Court felt that the impugned circulars which authorised reservation of posts falling inside civil services were not covered by Article 16 (4). Since they were not covered by Article 16 (4) they clearly contravened Article 16 (1) and (2) and as such are *ultra vires*. That in brief is the result of the findings recorded by the High Court.

The first question which falls to be considered is whether Article 16 (1) and (2) refer to promotion or whether they are confined to the initial appointment to any post in civil service. In the appeal before us the appellants and the respondent both conceded that cases of promotion fell within Article 16 (1) and (2) though they differed as to whether they were included in Article 16 (4). It would be immediately noticed that the respondent's petition postulates the inclusion of promotion in Article 16 (1) and (2) for it is on that assumption that he challenges the validity of the impugned circulars. Similarly, the appellants' defence postulates that Article 16 (1) and (2) as well as Article 16 (4) refer to cases of promotion for it is on the basis that Article 16 (4) includes promotion that they seek to support the validity of the impugned circulars. When this appeal was argued before the Constitution Bench on the first occasion it became clear that neither party was interested in contending that the guarantee afforded by Article 16 (1) and (2) is confined only to initial appointment and does not extend to promotion, and so notice was ordered to be issued to the Attorney-General. In response to the notice the Attorney-General has appeared and is represented by Mr. Sen. He has also taken the same stand as

the appellants have done and so in the result nobody before us is interested in challenging the inclusion of promotion within Article 16 (1) and (2). However, we would briefly indicate our reasons for accepting the concession made by the parties that promotion is included in Article 16 (1) and (2).

Article 16 (1) reads thus :

"There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State."

In deciding the scope and ambit of the fundamental right of equality of opportunity guaranteed by this Article it is necessary to bear in mind that in construing the relevant Article a technical or pedantic approach must be avoided. We must have regard to the nature of the fundamental right guaranteed and we must seek to ascertain the intention of the Constitution by construing the material words in a broad and general way. If the words used in the Article are wide in their import they must be liberally construed in all their amplitude. Thus construed it would be clear that matters relating to employment cannot be confined only to the initial matters prior to the act of employment. The narrow construction would confine the application of Article 16 (1) to the initial employment and nothing else ; but that clearly is only one of the matters relating to employment. The other matters relating to employment would inevitably be the provision as to the salary and periodical increments therein, terms as to leave, as to gratuity, as to pension and as to the age of superannuation. These are all matters relating to employment and they are, and must be, deemed to be included in the expression "matters relating to employment" in Article 16 (1). Similarly, appointment to any office which means appointment to an office like that of the Attorney-General or Comptroller and Auditor-General must mean not only the initial appointment to such an office but all the terms and conditions of service pertaining to the said office. What Article 16 (1) guarantees is equality of opportunity to all citizens in respect of all the matters relating to employment illustrated by us as well as to an appointment to any office as explained by us.

This equality of opportunity need not be confused with absolute equality as such. What is guaranteed is the equality of opportunity and nothing more. Article 16 (1) or (2) does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. Any provision as to the qualifications for the employment or the appointment to office reasonably fixed and applicable to all citizens would certainly be consistent with the doctrine of the equality of opportunity ; but in regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employmetnt, and even in regard to such promotion to a selection post all that Article 16 (1) guarantees is equality of opportunity to all citizens who enter service.

If the narrow construction of the expression "matters relating to employment" is accepted it would make the fundamental right guaranteed by Article 16 (1) illusory. In that case it would be open to the State to comply with the formal requirements of Article 16 (1) by affording equality of opportunity to all citizens in the matter of initial employment and then to defeat its very aim and object by introducing discriminatory provisions in respect of employees soon after their employment. Would it, for instance, be open to the State to prescribe different scales of salary for the same or similar posts, different terms of leave or superannuation for the same or similar posts? On the narrow construction of Article 16 (1) even if such a discriminatory course is adopted by the State in respect of its employees that would not be violative of the equality of opportunity guaranteed by Article 16 (1). Such a result could not obviously have been intended by the Constitution. In this connection it may be relevant to remember that Article 16 (1) and (2) really give effect to the equality before law guaranteed by Article 14 and to the prohibition of discrimination guaranteed by Article 15 (1). The three provisions form part of the same constitutional code of guarantees and supplement each other. If that be

so, there would be no difficulty in holding that the matters relating to employment must include all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment.

Article 16 (2) provides that no citizen shall, on grounds only of religion, race caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. This sub-Article emphatically brings out in a negative form what is guaranteed affirmatively by Article 16 (1). Discrimination is a double-edged weapon ; it would operate in favour of some persons and against others ; and Article 16 (2) prohibits discrimination and thus assures the effective enforcement of the fundamental right of equality of opportunity guaranteed by Article 16 (1). The words " in respect of any employment " used in Article 16 (2) must, therefore, include all matters relating to employment as specified in Article 16 (1). Therefore, we are satisfied that Mr. Sen is right when on behalf of the Attorney-General he conceded that promotion to selection posts is included both under Article 16 (1) and (2). Broadly stated the Bombay and the Patna High Courts support the concession made by Mr. Sen (vide; *Pandurang Kashinath More* v. *The Union of India*[1] ; *Sukhnandan* v. *State*[2]), whereas the Allahabad High Court is against it(vide: *Moinuddin and others* v. *State of Uttar Pradesh*[3].)

In this connection we ought to add that *Union of India* v. *Pandurang Kashinath More*[4], in which the Union of India challenged the correctness of the Bombay decision was set down for hearing along with this appeal , and in the judgment which we are pronouncing in the said appeal today we are accepting the appellants' contention that the question about the invasion of the fumdamental right guaranteed by Article 16 (1) was not properly raised by the respondent in his plaint in that case and had in fact not been proved ; accordingly we are holding that the High Court was in error in proceeding to deal with the dispute on the basis that violation of Article 16 (1) had been admitted by the Union. In the result we are allowing the said appeal and setting aside the decision of the High Court on this narrow ground.

Article 16 (3) provides for one exception to the provisions of Article 16 (1) and (2) in that it authorises Parliament to make any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment. We are not concerned with this provision in the present appeal.

That takes us to Article 16 (4). It reads thus :

"Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. "

In construing Article 16 (4) the respondent is no doubt entitled to contend that this sub-Article in substance provides for an exception to the fundamental rights guaranteed by Article 16 (1) and (2) and as such it must be strictly construed. On the other hand, the appellants may well urge that in construing its provisions the Court should not lose sight of the fact that the Constitution has, if we may say so wisely, showed very great solicitude for the advancement of socially and educationally backward classes of citizens. Article 15 (4) which provides, *inter alia*, for an exception to the prohibition of discrimination on grounds specified in Article 15 (1) lays down that nothing contained in the said Article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Similiarly, Article 335 requires that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently

1. I.L.R. (1958) Bom. 1266.
2. (1956) I.L.R. 35 Pat. 1.
3. A.I.R. 1960 All. 484.
4. Civil Appeal No. 579 of 1960.

with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. For historical reasons which are well-known the advancement of socially and educationnally backward classes has been treated by the Constitution as a matter of paramount importance and that may have to be borne in mind in construing Article 16 (4).

On one point in relation to the construction of Article 16 (4) the parties are in agreement. It is common ground that Article 16 (4) does not cover the entire field covered by Article 16 (1) and (2). Some of the matters relating to employment in respect of which equality of opportunity has been guaranteed by Article 16 (1) and (2) do not fall within the mischief of non-obstantive clause in Article 16 (4). For instance, it is not denied by the appellants that the conditions of service relating to employment such as salary, increment, gratituity, pension and the age of superannuation there can be no exception even in regard to the backward classes of citizens In other words, these matters relating to employment are absolutely protected by the doctrine of equality of opportunity and they do not form the subject-matter of Article 16 (4). That is why we have just observed that part of the ground covered by Article 16 (1) and (2) is admittedly outside the scope of Article 16 (4). The point in dispute is : Is promotion to a selection post which is included in Article 16 (1) and (2) covered by Article 16 (4) or is it not? It is on this point that there is a sharp controversy between the parties.

Before construing Article 16 (4) it would be convenient to deal with the question as to whether posts specified by it are posts inside the services or outside them. As we have already seen the High Court has taken the view that the posts in the context must necessarily mean posts outside the services and that in fact is the sole basis of the decisions of the High Court against the appellants. The High Court has held that the legislative history of the words "appointments" and "posts" justify the conclusion that "posts" are ex-cadre posts. Is that really so? In our opinion, the answer to this question must be in the negative. The argument that legislative history about the use of the relevant words is decisively in favour of excluding service posts from the purview of Article 16 (4) ignores the fact that there can be no legislative history for the provisions of Article 16 (4) which have found a place in the Constitution for the first time. Besides, it is not correct to assume that even the legislative history shows that " posts " always and inevitably meant posts outside services though it may be conceded that in the majority of corresponding constitutional provisions they do not refer to ex-service posts.

Let us look at the relevant provisions of the Constitution itself. Article 309 empowers the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. In the context " posts " means posts outside services. Similarly Article 310 (1) refers to every person who is a member of defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union. The word " post " in the context means an ex-carde post. Likewise the expression " civil post " in Article 311 (1) means a civil post outside the services. Article 335 to which we have referred user the word " posts " in the same sense. But, when we go to Article 336 the word " posts " in the context means posts in the services therein enumerated. The position disclosed by the corresponding provisions of the Constitution Act of 1935 is substantially the same. Sections 240 and 241 for instance use the word "posts" in the sense of ex-service posts ; whereas section 246 refers to civil posts in the sense of posts inside the services. In our opinion, it would, therefore, be unreasonable to treat the word " posts " as a term of art and to clothe it inexorably with the meaning of ex-carde posts. It is the context in which the word "posts" is used which must determine its denotation.

What does the context of Article 16 (4) indicate ? That is the next question which we must consider. Article 16 (4) clearly shows that the power conferred by

it can be exercised in cases where the State is of the opinion that any backward class of citizens is not adequately represented in the services under it. In other words, the opinion formed by the State that the representation available to the backward class of citizens in any of the services is inadequate is a condition precedent for the exercise of the power conferred by Article 16 (4), and so the power to make reservation as contemplated by Article 16 (4) can be exercised only to make the inadequate representation in the services adequate. If that be so, both "appointments" and "posts" to which the operative part of Article 16 (4) refers and in respect of which the power to make reservation has been conferred on the State must necessarily be appointments and posts in the service. It would be illogical and unreasonable to assume that for making the representation adequate in the services under the State a power should be given to the State to reserve posts outside the cadre of services. If the word "posts" means ex-carde posts reservation of such posts cannot possibly cure the imbalance which according to the State is disclosed in the representation in services under it. Therefore, in our opinion, the key clause of Article 16 (4) which prescribes a condition precedent for invoking the power conferred by it itself unambiguously indicates that the word "posts" cannot mean ex-cadre posts in the context. In fairness to Mr. Kumaramangalam who appeared for the respondent, we ought to add that he did not resist the contention of Mr. Chatterjee, for the appellants, that the context requires that "posts" should be deemed to be posts inside services and not outside them. Therefore, the main, if not the sole, reason given by the High Court in support of its conclusion does not appear to us to be well-founded, and so Article 16 (4) must be construed on the basis that both "appointments" and "posts" to which its operative clause refers are appointments and posts in the services under the State. Incidentally, we may repeat what we have already pointed out that the tenor of the judgment under appeal shows that if the High Court had construed the word "posts" as posts inside the services it would not have issued the writ in favour of the respondent.

Having in substance conceded that "posts" does not mean posts outside services Mr. Kumaramangalam presented a very plausible argument in support of his case that the impugned circulars fall outside Article 16 (4). He contends that the key clause on which Mr. Chatterjee relies in construing the word "posts" as meaning posts in the services itself shows that direct promotion to selection posts by reservation is not permissible under Article 16 (4). His argument is that if it is discovered that any backward class of citizens is not adequately represented in the services under the State the State may no doubt seek to introduce the balance by giving adequate representation to the backward class by making reservations for initial appointments. It may decide the proportion of the said reservation in order to introduce the balance and then give effect to it by making adequate number of appointments by reservation at the intital stage. If this process by itself appears to the State to be slow and tardy it may even reserve selection posts but this reservation can be given effect to gain by promoting suitable backward candidates to the said posts after they fall vacant and making a proportionately larger number of appointments at the initial stage. In any case reservation must work from the botton and reservation cannot be permitted to allow direct appointment to selection posts as the impugned circulars seek to do. It may be conceded that reservation of appointments or posts may be made in the manner suggested by Mr. Kumaramagalam. It may also be assumed that giving restrospective effect to reservations may well avoid heart-burning or dissatisfaction amongst the general class of employees and in that sense it would be an act of wisdom not to give effect to reservation retrospectively. But, with the propriety or the wisdom of the policy underlying the circulars we are not directly concerned. Even if it be assumed that it would be open to the State to adopt the method suggested by Mr. Kumaramangalam to give effect to the power of reservation in order to make the representation of the backward classes adequate in its services does it follow that it is the only method permissible under Article 16 (4)? We are inclined to hold that the answer to this question cannot be in favour of the respondent. If it is conceded that selection posts can be

reserved it is difficult to see how it would be open to the respondent to contend that these reserved selection posts must be filled only prospectively and not retrospectively. The concession that selection posts can be reserved on which the argument is based itself provides the answer to the argument that if the said posts can be reserved the reserved posts can be filled either prospectively or retrospectively. In adopting the latter course there can be no violation of the constitutional provision contained in Article 16 (4).

The condition precedent for the exercise of the powers conferred by Article 16 (4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. This condition precedent may refer either to the numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of "size" as well as "values", numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwsie of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the intial stage. In a given case the State may well take the view that a certain percentage of selection posts should also be reserved, for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively. If it is conceded that posts in the context refer to posts in the services and that selection posts may be reserved but should be filled only in the manner suggested by the respondent then we see no resaon for holding that the reservation of selection posts cannot be implemented by promoting suitable members of backward class of citizens to such posts as the circulars intend to do.

We must in this connection consider an alternative argument that the word " post " must refer not to selection posts but to posts filled by initial appointments. On this argument reservation of appointments means reservation of certain percentage in the initial appointments and reservation of posts means reservation of initial posts which may be adopted in order to expedite and make more effective the reservation of appointments themselves. On this construction the use of the word "posts" appears to be wholly redundant. In our opinion, having regard to the fact that we are construing the relevant expression " reservation of appointments " in a constitutional provision it would be unreasonable to assume that the reservation of appointments would not include both the methods of reservation, namely, reservation of appointments by fixing a certain percentage in that behalf as well as reservation of certain initial posts in order to make the reservation of appointments more effective. That being so, this alternative argument which confines the word "posts" to initial posts seems to us to be entirely unreasonable. On the other hand, under the construction by which the word " posts " includes selection posts the use of the word " posts " is not superfluous but serves a very important purpose. It shows that reservation can be made not only in regard to appointments which are initial appointments but also in regard to selection posts which may fall to be filled by employees after their employment. This construction has the merit of interpreting the words "appointments" and "posts" in their broad and liberal sense and giving effect to the policy which is obviously the basis of the provisions of Article 16 (4). Therefore, we are disposed to take the view that the power of reservation which is conferred on the State under Article 16 (4) can be exercised by the State in a proper case not only by providing for reservation of appointments but also by providing for reservation of selection posts. This construction, in our opinion, would serve to give effect to the intention of the Constitution-makers to make adequate safeguard

for the advancement of backward classes and to secure for their adequate representation in the services. Our conclusion, therefore, is that the High Court was in error in holding that the impugned circulars do not fall within Article 16 (4).

It is true that in providing for the reservation of appointments or posts under Article 16 (4) the State has to take into consideration the claims of the members of the backward classes consistently with the maitenance of the efficiency of administration. It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency ; but the risk involved in sarificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts. It is also true that the reservation which can be made under Article 16 (4) is intended merely to give adequate representation to backward communities. It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees. In exercising the powers under Article 16 (4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration ; but in the present case, as we have already seen, the challenge to the validity of the impugned circulars is based on the assumption that the said circulars are outside Article 16 (4) because the posts referred to in the said Article are posts outside the cadre of services and in any case do not include selection posts. Since in our opinion, this assumption is not well-founded we must hold that the impugned circulars are not unconstitutional.

In the result the decision of the High Court under appeal is reversed and the respondent's application for a writ is dismissed. There would be no order as to costs.

Wanchoo, J.—I have read the judgment just delivered by my learned brother Gajendragadkar, J., and I agree with him as to the scope of Article 16 (1) of the Constitution. I also agree with him that the Scheduled Castes and the Scheduled Tribes are included in the words " backward class of citizens " in Article 16 (4) and that the word " posts " in that Article refers to posts in the services and not to posts outside the services. I regret however that I have not been able to persuade myself that Article 16 (4) permits reservation even in grades within a particular service in case the service has various grades in its cadre, and proceed to give my reasons for the same.

Before I construe the words of Article 16 (4), I may state that I am not unmindful of the fact that Article 16 (4) is a constitutional provision and that constitional provisions are not to be interpreted in any narrow or pedantic sense. At the same time it cannot be forgotten that Article 16 (4) is in the nature of an exception or a proviso to Article 16 (1), which is a fundamental right providing equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. This aspect of Article 16 (4) in my opinion inevitably requires that the proviso or the exception should not be interpreted so liberally as to destroy the fundamental right itself to which it is a proviso or exception. The construction therefore of Article 16 (4) cannot ignore this aspect of the matter.

I now read Article 16 (4) :

> " Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. "

Before I turn to the actual words used in the Article I must refer to what I consider is implicit in that Article. The Article provides for reservation of appointments or posts and it seems to me obvious that it is implicit in the Article that the

reservation of appointments or posts cannot go to the length of reserving all appointments or posts or even to the length of reserving a majority of them. The reason why I say that all appointments or posts cannot be reserved under Article 16 (4)—(though that would be the result if the widest possible interpretation is given to the words used in the Article)—is that if all appointments or posts could be reserved under Article 16 (4) it would mean complete destruction of the fundamental right guaranteed under Article 16 (1). It could not be the intention of the Constitution-makers that the proviso or exception in Article 16 (4) should be so used as to destroy completely the fundamental right enshrined in Article 16 (1). Nor do I think that it is permissible under Article 16 (4) to reserve a majority of appointments or posts, for that again, in my opinion, though it may not completely destroy the fundamental right guaranteed under Article 16 (1) will certainly make it practically illusory. Again it could not be the intention of the Constitution-makers that Article 16 (4) should be so interpreted as to make the fundamental right guaranteed under Article 16 (1) illusory. I may in this connection refer to Article 335, which occurs in Part XVI dealing with Special Provisions relating to certain Classes, which reinforce what I have said above. That Article provides that

> " the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

Now the Scheduled Tribes and the Scheduled Castes are included in the words " backward class of citizens " used in Article 16 (4). Therefore in considering the claims of, at any rate, a part of, those included in Article 16 (4)—(and I presume the same will apply to the whole) the maintenance of efficiency of administration must be kept in mind, for the reservation provided in Article 16 (4) is to meet the claims of the members of the Scheduled Castes and the Scheduled Tribes. Reservation, therefore, of all appointments or posts or even a majority of them is certain to result in the impairment of efficiency of administration and therefore what I consider as implicit in Article 16 (4) is borne out also by the provision in Article 335. It is in this background that the interpretation of Article 16 (4) falls to be considered.

Turning now to the words in Article 16 (4), it appears to me that the key words in that Article are " not adequately represented in the services under the State. " Obviously, reservation can be made under this Article only if the State comes to the conclusion that any backward class of citizens is not adequately represented in the services under it. If, for example, the State is of opinion that backward classes are adequately represented in the services it can make no reservation under Article 16 (4). What then is the meaning of these key words in this Article? What these words require is that reservation may be made in order to make the representation of any backward class of citizens adequate in the services. Does the word "adequate" imply only numerical representation in the services or does it imply something more than that? The three meanings of the word "adequate" given in the Shorter Oxford English Dictionary are (i) equal in magnitude and extent ; (ii) commensurate in fitness, sufficient, suitable ; and (iii) fully representing (logic). It seems to me that it is the second meaning (namely sufficient) which properly, applies to the words " adequately represented " as used in this Article. " Sufficient " has two meanings: (i) Sufficing, adequate, especially in amount or number to the need, (ii) enough, adequate quantity. Therefore when Article 16 (4) says that reservation ma be made in order that any backward class of citizens may be adequately represented in the services it means that reservation may be made in order to make the number of any backward class sufficient in the services under the State. These words do not in my opinion convey any idea of quality and can only mean sufficient quantitative representation in the services under the State. If the intention of the Constitution-makers was that there may also be reservation in various grades in a particular service where there are grades in the service, I should have expected diffierent words being used in Article 16 (4) to convey that meaning. These key words used in this Article further convey the idea of representation in the services as a whole, for

there are no words which suggest that the service should be broken up in case there are grades in it for the purposes of adequate representation. The conclusion therefore at which I arrive is that these key words convey the idea of adequate numerical representation for any backward class of citizens in a particular service as a whole and it is for this purpose alone that reservation can be made of appointments or posts in the services.

This brings me to the question as to how the reservation is to be made. Article 16 (4) tells us that it may be made either by reserving appointments to the services or reserving posts in the services. Appointments in my opinion clearly mean the intital appointments to a service, for a person is appointed only once in a service and thereafter there is no further appointment. Therefore, when the Article speaks of reservation of appointments it means reservation of a percentage of initial appointments to the service. Posts refer to the total number of posts in the service and when reservation is by reference to posts it means reservation of a certain percentage of posts out of the total number of posts in the service. The reason why these two methods are mentioned in this Article is also to my mind plain. The method of reservation of appointments would mean that the goal of adequate representation may be reached in a long time. Therefore, in order that the goal may be reached in a comparatively shorter period of time, the Article also provides for the method of reservation of posts. This will be clear from an example which I may give. Suppose there are 1,000 posts in a particular service and the backward classes have no representation at all in that service. The State considers it necessary that they should have adequate representation in that service. Suppose also that the annual appointments to be made to the service in order to keep it at full strength is thirty. Now the State if it chooses the method of reservation of appointments will reserve a percentage of appointments each year for backward classes. Now suppose that that percentage is fixed at ten per centum. In order therefore to reach the ten per centum of the total number of posts in the service by the method of reservation of appointments, the period taken would be roughly 34 years. This period may be considered too long and therefore the State may decide to adopt the other way, *i. e.*, the reservation of posts; suppose it is decided to reserve ten percentum of the posts, *i. e.*, 100 in all. It will then be open to the State having reserved 100 posts in this particular service for backward classes to say that till these 100 posts are filled up by backward classes all appointments will go to them provided the minimum qualifications that may be prescribed are fulfilled. Suppose further that it is possible to get annually the requisite number of qualified members of backward classes equal to the annual appointments, the representation of the backward classes will be made adequate in about four years. Once the representation is adequate there will be no power left for making further reservation. Thus by the method of reservation of appointments the representation is made adequate in a long period of time while by the method of reserving posts the representation is made adequate in a much shorter period. That seems to be the reason why the Article speaks of reservation of appointments as well as of posts.

It is however said that this construction of Article 16 (4) makes the use of the word "posts" therein superfluous, and that the same result of making the representation adequate quickly could have been achieved if the word "appointments" only had been used therein. I am of opinion that this is not so and the use of the word "appointments" only in Article 16 (4) would not have made it possible for the State to make the representation of backward classes adequate in a short space of time. In the example I have given the representation of backward classes was made adequate in four years by the method of reservation of posts; it would however not have been possible to make the representation adequate in this hypothetical case in such a short time if the Article only provided for reservation of appointments. I have already said that it is implicit in the Article that reservation cannot be of all appointments or even of a majority, of them, for that would completely destroy the fundamental right enshrined in Article 16 (1) to which Article 16 (4) is in the nature of a proviso or an exception or at any rate make it practically illusory;

Therefore, it would not be open to the State to reserve all or even a majority of the appointments for backward classes, if the word " appointments " only had been used in Article 16 (4). Even if a larger percentage than ten per centum were reserved for backward classes in the matter of appointments in the hypothetical case given by me it would not be possible to reach the total of 100 posts for the backward classes in the service in less than twice or thrice the time taken by the method of reservation of posts, for the State could not reserve all or even the majority of appointments in any particular year, in view of what is implicit in Article 16 (4), if the word, " appointments " only had been there. It seems to me therefore that the use of the word " posts " in that Article was with a purpose, namely, that by the method of reservation of posts the inadequate representation may be made adequate within a short space of time and the objection that could be raised to the reservation of all appointments, if only the word " appointments " had been used in the Article, would no longer be available. It cannot therefore be said that on the interpretation I have placed on Article 16 (4) the use of the word " posts " therein becomes superfluous.

I have already said that if the intention was not only to make reservation in the service as a whole whether by the method of reserving appointments or by the method of reserving posts but also to include reservation in various grades in which a service may be divided, the words of Article 16 (4) would have been different. I may in this connection refer to Article 335 again, which lays down that the claims of the Scheduled Castes and the Scheduled Tribes (which are part of backward classes of citizens) shall be considered consistently with the maintenance of efficiency of administration. It seems to me that reservation of posts in various grades in the same service is bound to result, for obvious reasons, in deterioration in the efficiency of administration ; and reading Article 335 along with Article 16 (4) which to my mind is permissible on the principle of harmonious construction (see *Pandit M.S.M. Sharma* v. *Shri Sri Krishna Sinha and others*[1], it could not be the intention of the Constitution-makers that reservation in Article 16 (4), for at any rate a part of those comprised therein, should result in the impairment of the efficiency of administration. It also seems to me equally obvious that what applies to a part of those comprised in the words " any backward class of citizens " also applies to the whole. Therefore, in the absence of clear words in Article 16 (4) which would compel one to hold that reservation was meant to apply not only to the service taken as a whole but also to various grades in which the service might be divided, I feel that an interpretation should not be given which would result in the impairment of efficiency of administration, which is jealously safeguarded even when considering the claims of the Scheduled Castes and the Scheduled Tribes. I am therefore of opiion that giving the words used in Article 16 (4) as liberal an interpretation as is possible without destroying or making illusory the fundamental right guaranteed in Article 16 (1) to which Article 16 (4) is in the nature of an exception or a proviso, Article 16 (4) can only mean that the State has the power thereunder to reserve numerically a certain percentage of appointments or posts in the manner I have indicated above and it has no power to split the service into various grades which might exist in it and make reservation in each grade because of the use of the word " posts " therein. I would therefore dismiss the appeal but for different reasons.

Rajagopala Ayyangar, J.—I regret that I cannot share the view of my learned brethren expressed by Gajendragadkar, J., that the appeal should be allowed and I agree with Wanchoo, J., that the appeal should be dismissed and the order of the High Court maintained.

The facts of the case have been set out in great detail in the judgments already delivered and it is unnecessary to repeat them.

Mr. Chatterji when he opened the appeal appeared to claim that the scope and content of Article 16 (1) and of sub-Article (4) thereof were identical and that if

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1. (1959) 1 S.C.R. (Suppl.) 806, 859-60 : 1959 S.C.J. 925 : (1959) 2 M.L.J. (S.C.) 125 : (1959) 2 An W.R. (S.C.) 125 : (1959) M.L.J. (Cr.) 660.

Article 16 (1) guaranteed by the use of the wide expression " matters relating to employment ", " equality of opportunity " in relation to promotions also, Article 16 (4) should be construed to have the same width. But this argument however he abandoned at a later stage. The point therefore does not call for any consideration and the judgments now delivered proceed on the basis that the scope of the limitation on the equality of opportunity which is provided in Article 16 (4) is not co-extensive with the freedom guaranteed by Article 16 (1). The only question therefore is in what respect is Article 16 (4) narrower than Article 16 (1). In considering this the rule of construction should be borne in mind that a restriction on a guaranteed freedom should be narrowly construed so as to afford sufficient scope for the freedom guaranteed.

The judgment of the learned Judge now under appeal proceeds on the basis that the expression " posts " in Article 16 (4) was a reference to what are termed in service parlance 'ex cadre posts' and not posts in the service. Mr. Chatterji's submission was that the learned Judge had no basis for importing the nomenclature and the classifications to be found in Part XIV into Part III dealing with fundamental rights. In particular, Mr. Chatterji quarrelled with the statement by the learned Judge that the expression 'appointments and posts' occurring in Article 16 (4) were " virtually terms of art which had to be interpreted and understood in the light of the legislative history of the constitutional enactments that preceded the Constitution, and in consonance with the scheme that underlies the provisions of the Constitution, which have reference to the civil services and civil servants in this country". Mr. Chatterji further pointed out that the learned Judge went wrong in observing that " The expressions appointments and posts in Article 16 (4) have really to be read as appointments to services and appointments to posts " on the ground that the words used in Article 16 (4) were merely appointments and posts and not "appointments to services", etc., the latter occurring only in Part XIV. It was, however, common ground that if the learned Judge was right in considering that "appointments" in Article 16 (4) meant "appointments to services", the notification now impugned should be held to be unconstitutional.

Mr. Chatterji did not dispute that when the expressions 'appointments to services and appointments to posts' occurred in Chapter XIV (*vide* for instance in Articles 309. 311) etc., being phrases borrowed from statutory provisions of the Government of India Act, 1935, the expression 'appointment to a 'post' designated an 'ex cadre post.' The submission, however, of learned counsel was that there was no justification for importing the phraseology employed in Part XIV in Article 16 (4), notwithstanding that Article 16 dealt with equality of opportunity for employment in the services of the State and sub-Article (4) was concerned with the reservation of appointments in services under the State. His submission was that Article 16 (4) had no legislative precedent in the previous constitutional enactments to justify the importation of service rules and service jargon as an aid to its construction.

My learned brothers have acceded to this submission of Mr. Chatterji. With great respect to them I consider that the view of the learned Judge of the High Court is correct. In the first place, the Article being one concerning the right to be employed in the Services of the State, one has necessarily to turn to the relevant provisions in relation to the Services to discover the precise import of the expressions used in relation to the services. Besides, we are not left in doubt as to the inter-connection between Article 16 and Part XIV dealing with services, because Article 335 forms, as it were, the link between Part XIV and the provisions for reservation in favour of the backward communities in Article 16 (4) setting out as it does the principles that should guide the State in the matter of reservation in the services which could obviously be only a reference to that provided for by Article 16 (4). Article 335 runs :

> " The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State. ".

In this Article, at any rate, it cannot be contended, and I did not understand Mr. Chatterji to contend, that 'posts' had any reference to 'posts in the services.' If it

were so then in my judgment it would follow that the phraseology employed in this Article which deals with the same subject as that dealt with by Article 16 (4) throws light on and explains the meaning of the expression 'posts' in Article 16 (4). It is only necessary to add that Article 320 (4) which runs :

> " Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which effect may be given to the provisions of Article 335".

to which learned Counsel for the respondent drew our attention indicates, if other indication were necessry, that Articles 16 (4) and 335 have to be read together and not as if the 'posts' referred to in Article 335 indicated a different idea or connoted a different concept from the same word used in Article 16 (4).

Even if the above view were wrong and the expression 'posts' were intended to designate not 'ex cadre posts' but 'posts in the service' I am unable to hold that the appellant derives any advantage. As my learned brother Wanchoo, J., has pointed out, the crucial words in Article 16 (4) and which form as it were the key to its interpretation, from which the power of the State to make the reservation stems, are that a class of citizens " is not adequately represented in the services of the State." The action permitted to be taken to redress this inadequacy is by reservation of appointments and posts. If by the expression 'posts' are meant 'posts in the service itself' I feel unable to attribute to the expression 'posts' any special significance beyond an appointment to the service. Every appointment in a service must be to " a post " in a service, because there cannot be an appointment in the air but can only be to a " post" in a service. In that sense, in my view, the expression 'post' would be really redundant unless, of course, as I have said earlier, it meant not posts in a service but ex cadre posts.

There is also one other aspect to which I might advert. In some of the top grades there are single posts in the Service. If at any point of time the incumbent is not a member of the backward class, it would certainly be a case of inadequate representation as regards that post which would mean that such posts which are single may be reserved for all time to be held by members of the backward classes, because if at any moment such a person ceases to hold the post there would be inadequate representation in regard to that post. I have drawn attention to this because it pointedly demonstrates that the correct view is that when " inadequacy of representation" is referred to in Article 16 (4) as justifying a reservation, the only rational and reasonble construction of the words are that it refers to a quantative deficiency in the representation of the backward classes in the service taken as a whole and not to an inadequate representation at each grade of service or in respect of each post in the service.

Besides, even on the footing that "posts" mean posts in the services, Article 16 (4) properly construed in the light of Article 335 of the Constitution whose interaction has been discussed in great detail by Wanchoo, J., in the judgment just now pronounced with which I entirely agree, contemplates and permits reservation only in respect of appointments to services at the initial stage and not at each stage even after the appointment has taken place.

There is one other matter also which I consider relevant in this context. Under Article 16 (4) the State is enabled to make provision for the reservation of appointments if in their opinion certain backward classes of citizens are not adequately represented in the service. The Article therefore contemplates action in relation to and having effect in the future when once the State forms the opinion about the inadequacy of the Service. If an inadequacy exists today, to give retrospective effect to the reservation, as the impugned notification has done, would be to redress an inadequate representation which took place in the past by an order issued today. In my judgment that is not contemplated by the power conferred to reserve which can only mean for the future. As this point however has not been argued I do not desire to rest my judgment on it, but have mentioned it to draw attention to another feature of the notification which deserves consideration.

I would therefore dismiss the appeal with costs.

ORDER.

By the Court.—In accordance with the opinion of the majority the appeal is allowed; the decision of the High Court under appeal is reversed and the respondent's application for a writ is dismissed. There will be no order as to costs.

Appeal allowed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Surajpal Singh .. *Appellant**

v.

The State of Uttar Pradesh .. *Respondent.*

Prevention of Corruption Act (II of 1947), section 5 (3)—Acquittal of accused of only charge of misconduct under section 5 (1) (c)—Conviction for offence under section 5 (1) (a) (b) or (d) based on presumption under section 5 (3)—Not sustainable.

Where the charge against the accused referred only to criminal misconduct in the discharge of his duty by a public servant of the nature mentioned in clause (*c*) of section 5 (1) of the Prevention of Corruption Act, it was open to the Special Judge to convict him of that offence by invoking the rule of presumption laid down in section 5 (3). But where the Judge has acquitted him on that charge, the accused could not be found guilty of any other type of criminal misconduct referred to in clauses (*a*), (*b*) or (*d*) of sub-section (1) of section 5 in respect of which there was no charge by calling in aid the rule of presumption laid down in section 5 (3).

Appeal by Special Leave from the Judgment and Order, dated the 27th March, 1958, of the Allahabad High Court in Criminal Appeal No. 785 of 1955.

Nuruddin Ahmad and *Naunit Lal*, Advocates, for Appellant.

G. C. Mathur and *C. P. Lal*, Advocates, for Respondent.

The Judgment of the Court was delivered by

S. K. Das, J.—This is an appeal by Special Leave from the Judgment and order of the High Court of Judicature at Allahabad, dated March 27, 1958, whereby the said High Court maintained the conviction of the appellant under section 5 (2) of the Prevention of Corruption Act (II of 1947), but reduced the sentence of four years' rigorous imprisonment passed on the appellant by the Special Judge, Kanpur, to two years' rigorous imprisonment.

The short facts are these. The appellant, Surajpal Singh, was employed in the Police Department of the Uttar Pradesh Government. He started his service as a Constable on a salary of Rs. 13 per month from August 1, 1930. In 1946 his pay was increased to Rs. 46 per month. He was appointed a Head Constable on a salary of Rs. 50 per month in 1947. He officiated as Sub-Inspector of Police sometime in 1948 and 1949 on a salary of Rs. 150 per month. On March 1, 1949, he was reverted to his post of Head Constable. Between the dates February 27, 1951, and September 9, 1952, he was posted as a Head Constable attached to the Sardar Malkhana, Kanpur. The charge against him was that in that capacity he dishonestly or fraudulently misappropriated or otherwise converted to his own use many articles, principally those seized in connection with excise offences kept in deposit in the said

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* Crl. Appeal No. 169 of 1959. 7th December, 1960.

Malkhana. These articles included opium, bottles of liquor, etc. The charge further stated that a sum of Rs. 9,284-1-0 was recovered on a search of his house on September 9 and 10, 1952, and this amount was disproportionate to the known sources of income of the appellant. There was an allegation by the prosecution that the acts of dishonest misappropriation, etc., were committed by the appellant in conspiracy with two other persons called Bhagwat Singh and Gulab Singh. Therefore, the charges against the appellant were (1) for the offence of conspiracy under section 120-B of the Indian Penal Code; (2) for the offence under section 5 (1) (*c*) of the Prevention of Corruption Act, 1947, for the acts of dishonest misappropriation or user, read with section 5 (2) of the said Act; and (3) for an offence under section 465 of the Indian Penal Code in respect of a particular entry said to have been forged in the Register of Properties kept in the Sardar Malkhana.

The learned Special Judge who tried the appellant, Bhagawat Singh and Gulab Singh, recorded an order of acquittal in respect of the latter two persons. As to the appellant, he was also acquitted of all the charges except the charge under section 5 (2) of the Prevention of Corruption Act. On this charge the learned Special Judge recorded an order of conviction, but this was based on the sole ground that the appellant had failed to account satisfactorily for the possession of Rs. 9,284-1-0 which, according to the finding of the learned Special Judge, was disproportionate to the known sources of income of the appellant. It should be noted here that the learned Special Judge held the appellant not guilty of the various acts of dishonest misappropriation or user allged against him in respect of the properties kept in the Sardar Malkhana.

In his appeal to the High Court the appellant urged various grounds, one of which was that he could not be convicted on the rule of presumption laid down in sub-section (3) of section 5 of the Prevention of Corruption Act, 1947, when on the only charge of criminal misconduct alleged under section 5 (1) (*c*) of the said Act he had been found not guilty. The High Court repelled this contention and upheld the conviction of the appellant but reduced the sentence.

The principal question before us is whether in the circumstances of this case, the conviction of the appellant on the charge under sub-section (2) of section 5 of the Prevention of Corruption Act, 1947, by invoking the rule of presumption as laid down in sub-section (3) of that section, is correct.

It is convenient to read here section 5 of the Prevention of Corruption Act, 1947, in so far as it is relevant for our purpose:

"*Section* 5 (1). A public servant is said to commit the offence of criminal misconduct in the discharge of his duty—

(*a*) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Indian Penal Code, or

(*b*) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(*c*) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(*d*) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine:

Provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.

(2-A)..

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

Now, learned Counsel for the appellant has put his argument on the principal question in the following way: he has submitted that he is not in a position in an appeal by Special Leave to go behind the finding of fact arrived at by the Courts below. The appellant, it appears, gave some explanation with regard to the possession of Rs. 9,284-1-0. That explanation was not, however, accepted by the Courts below. Learned Counsel has submitted that he does not wish to go behind that finding of fact. He has submitted, however, that the scheme of section 5 of the Prevention of Corruption Act, 1947, is this: sub-section (1) defines the offence of criminal misconduct in the discharge of his duties by a public servant; the offence can be one or more of four categories mentioned in clauses (*a*), (*b*), (*c*) and (*d*); sub-section (2) is the penal section which states the punishment for the offence of criminal misconduct; and sub-section (3) lays down a rule of presumption and states that no conviction for the offence shall be invalid by reason only that it is based solely on such presumption. Learned Counsel has pointed out, rightly in our opinion, that the charge against the appellant in the present case referred only to criminal misconduct in the discharge of his duty by a public servant of the nature mentioned in clause (*c*) of sub-section (1). In other words, the charge against the appellant was that he had dishonestly or fraudulently misappropriated or otherwise converted for his own use property entrusted to him, etc. It was open to the learned Special Judge to have convicted the appellant of that offence by invoking the rule of presumption laid down in sub-section (3). He did not, however, do so. On the contrary, he acquitted the appellant on that charge. Therefore, learned Counsel has submitted that by calling in aid the rule of presumption laid down in sub-section (3), the appellant could not be found guilty of any other type of criminal misconduct referred to in clauses (*a*), (*b*), or (*d*) of sub-section (1) in respect of which there was no charge against the appellant.

We consider that the above argument of learned Counsel for the appellant is correct and must be accepted. This Court pointed out in *C. S. D. Swamy* v. *The State*,[1] that sub-section (3) of section 5 of the Prevenion of Corruption Act, 1947, does not create a new offence but only lays down a rule of evidence which empowers the Court to presume the guilt of the accused in certain circumstances, contrary to the well-known principle of Criminal law that the burden of proof is always on the prosecution and never shifts on to the accused person. In *Sawmy's case*,[1] there were charges for the offence of criminal misconduct under two heads, clause (*a*) and clause (*d*). The trial Court held the accused person in that case not guilty of the offence under

1. (1960) S.C.J. 160 : (1960) M.L.J. (Crl.) 91 : (1960) 1 S.C.R. 461.

clause (*a*) but guilty of the offence under clause (*d*) by invoking the rule of presumption laid down in sub-section (3) of section 5. The distinction between that case and the case under our consideration is this; in *Swamy's case*,[1] there were two charges either of which could be founded on the rule of presumption laid down in sub-section (3); but in our case there is only one chare of criminal misconduct of which the appellant has been acquitted; therefore, there is no other charge which can be founded on the rule of presumption referred to in sub-section (3). This is the difficulty with which the respondent is faced in the present case. It appears to us that the learned Special Judge and the High Court proceeded wrongly on the footing as though sub-section (2) or sub-section (3) of section 5 of the Act creates an offence. The offence which is punished under sub-section (2) or can be founded on the rule of presumption laid down in sub-section (3) must be the offence of criminal misconduct of one or more of the categories mentioned in clauses (*a*) to (*d*) of sub-section (1). In the case before us the only category which was alleged against the appellant was that of category (*c*), namely, dishonest or fraudulent misappropriation, etc. That charge having failed, there was no other charge which could be founded on the rule of presumption laid down in sub-section (3).

Learned Counsel for the respondent State has contended before us that it was open to the appellate Court to affirm the conviction of the appellant under sub-section (2) of section 5 by holding him guilty of the offence of criminal misconduct of the category mentioned in clause (*a*) or clause (*d*) of sub-section (1). We are unable to accept this contention as correct. The prosecution never alleged that the sum of Rs. 9,284-1-0 was the result of the appellant habitually accepting or obtaining illegal gratification, etc. The prosecution case was that the sum of Rs. 9,284-1-0 was the result of the dishonest user of property which was entrusted with the appellant. It is not open to the appellate Court to affirm the conviction of the appellant on an entirely new case never suggested against the appellant at any earlier stage. It is unfortunate that in this case the Courts below did not choose to rely on the rule of presumption laid down in sub-section (3) with reference to the charge under clause (*c*) of sub-section (1) of section 5. But that misfortune cannot now be repaired by evolving out of a vacuum as it were a new case against the appellant based on clause (*a*) or clause (*d*) of sub-section (1) of section 5 in support of which no facts were even alleged or suggested.

For the reasons given above, we allow this appeal and set aside the conviction and sentence passed against the appellant.

Appeal allowed.

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1. (1960) S.C.J. 160: (1960) M.L.J. (Crl.) 91: (1960) 1 S.C.R. 461.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—S. K. DAS, J. L. KAPUR, K. SUBBA RAO, M. HIDAYATULLAH AND J. C. SHAH, JJ.

The State of Uttar Pradesh .. *Appellant**

v.

Deoman Upadhyaya .. *Respondent.*

The Attorney-General for India .. *Intervener.*

Evidence Act (I of 1872), section 27—If void as offending Article 14 of the Constitution of India (1950)—Criminal Procedure Code (V of 1898), section 162 (2)—If void in so far as it relates to section 27 of the Evidence Act (I of 1872).

By *Majority* (*Subba Rao, J.* dissenting) :—By the continued operation of section 27 of the Evidence Act and section 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a Police Officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is proveable if he was in custody at the time when he made it otherwise it is not. Are persons in custody, by this distinction deprived of " equality before the law, or the equal protection of the laws " within the meaning of Article 14 of the Constitution ? " Persons in custody " and " persons not in custody " do not stand on the same footing nor require identical protection. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases. The expression " accused of any offence " is descriptive of the person against whom evidence relating to information alleged to be given by him is made proveable by section 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.

Accordingly section 27 of Evidence Act and section 162 (2) of the Code of Criminal Procedure in so far as " that section relates to section 27 of the Indian Evidence Act " are *intra vires* and do not offend Article 14 of the Constitution.

Appeal from the Judgment and Order, dated the 11th September, 1959, of the Allahabad High Court in Criminal Appeal No. 325 of 1959.

H. N. Sanyal, Additional Solicitor-General of India (*G. C. Mathur* and *C. P. Lal,* Advocates, with him), for Appellant.

H. J. Umrigar, O. P. Rana and *D. Goburdhan,* Advocates, for Respondent.

C. K. Daphtary, Solicitor-General of India and *H. N. Sanyal,* Additional Solicitor-General of India (*B. R. L. Iyengar* and *T. M. Sen,* Advocates, with them) for Intervener.

The Court delivered the following Judgment:—

Shah, J.—(for *S. K. Das, J. L. Kapur, JJ.* and himself). The Civil and Sessions Judge, Gyanpur, convicted Deoman Upadhyaya—respondent to this appeal—of intentionally causing the death of one Sukhdei in the early hours of June 19, 1958, at village Anandadih, District Varanasi and sentenced him to death subject to confirmation by the High Court. The order of conviction and sentence was set aside by the High Court of Judicature at Allahabad. Against that order of acquittal, the State of Uttar Pradesh has appealed to this Court with a certificate granted by the High Court.

* Crl, Appeal No. 1 of 1960. 6th May, 1960.

Deoman was married to one Dulari. Dulari's parents had died in her infancy and she was brought up by Sukhdei, her cousin. Sukhdei gifted certain agricultural lands inherited by her from her father to Dulari. The lands gifted to Dulari and the lands of Sukhdei were cultivated by Mahabir, uncle of Deoman Mahabir and Deoman entered into negotiations for the sale of some of these lands situated at village Anandadih, but Sukhdei refused to agree to the proposed sale. According to the case of the prosecution, in the evening of June 18, 1958, there was an altercation between Deoman and Sukhdei. Deoman slapped Sukhdei on her face and threatened that he would smash her face. Early in the morning of June 19, Deoman made a murderous assault with a *gandasa* (which was borrowed by him from one Mahesh) upon Sukhdei who was sleeping in the courtyard near her house and killed her on the spot, and thereafter, he threw the *gandasa* into the village tank, washed himself and absconded from the village. He was arrested in the afternoon of the 20th near the village Manapur. On June 21, he offered to hand over the *gandasa* which he said, he had thrown in the village tank, and in the presence of the investigating officer and certain witnesses, he waded into the tank and took out a *gandasa*, which, on examination by the Serologist, was found to be stained with human blood.

Deoman was tried for the murder of Sukhdei before the Court of Session at Gyanpur. The trial Judge, on a consideration of the evidence led by the prosecution, held the following facts proved:—

(*a*) In the evening of June 19, 1958, there was an altercation between Sukhdei and Deoman over the proposed transfer of lands in village Anandadih and in the course of the altercation, Deoman slapped Sukhdei and threatened her that he would smash her "mouth" (face).

(*b*) In the evening of June 18, 1958, Deoman borrowed a *gandasa* (Exhibit 1) from one Mahesh.

(*c*) Before day-break on June 19, 1958, Deoman was seen by a witness for the prosecution hurrying towards the tank and shortly thereafter he was seen by another witness taking his bath in the tank.

(*d*) Deoman absconded immediately thereafter and was not to be found at Anandadih on June 19, 1958.

(*e*) That on June 21, 1958, Deoman, in the presence of the investigating officer and two witnesses, offered to hand over the *gandasa* which he said he had thrown into a tank, and thereafter he led the officer and the witnesses to the tank at Anandadih and in their presence waded into the tank and fetched the *gandasa* (Exhibit 1) out of the water. This *gandasa* was found by the Chemical Examiner and Serologist to be stained with human blood.

In the view of the Sessions Judge, on the facts found, the 'only irresistible conclusion' was that Deoman had committed the murder of Sukhdei early in the morning of June 19,1958, at Anandadih. He observed:

"The conduct of the accused (Deoman) as appearing from the movements disclosed by him, when taken in conjunction with the recovery at his instance of the *gandasa* stained with human blood, which *gandasa* had been borrowed only in the evening preceding the brutal hacking of Snkhdei, leaves no room for doubt that Deoman and no other person was responsible for this calculated and cold-blooded murder."

At the hearing of the reference made by the Court of Session for confirmation of sentence and the appeal filed by Deoman before the High Court at Allahabad, it was contended that the evidence that Deoman made a statement before the police and two witnesses on June 21, 1958, that he had thrown

the *gandasa* into the tank and that he would take it out and hand it over, was inadmissible in evidence, because section 27 of the Indian Evidence Act which rendered such a statement admissible, discriminated between persons in custody and persons not in custody and was therefore void as violative of Article 14 of the Constitution. The Division Bench hearing the appeal referred the following two questions for opinion of a Full Bench of the Court:—

1. Whether section 27 of the Indian Evidence Act is void because it offends against the provisions of Article 14 of the Constitution? and

2. Whether sub-section (2) of section 162 of the Code of Criminal Procedure in so far as it relates to section 27 of the Indian Evidence Act is void?

The reference was heard by M. C. Desai, B. Mukherjee and A. P. Srivastava, JJ. Mukherjee, J. and Srivastava, J. opined on the first question, that "section 27 of the Indian Evidence Act creates an unjustifiable discrimination between "persons in custody" and "persons out of custody", and in that it offends against Article 14 of the Constitution and is unenforceable in its present form, and on the second question, they held that sub-section (2) of section 162 of the Code of Criminal Procedure "in so far as it relates to section 27 of the Indian Evidence Act is void". Desai J. answered the two questions in the negative.

The reference for confirmation of the death sentence and the appeal filed by Deoman were then heard by another Division Bench. In the light of the opinion of the Full Bench, the learned Judges excluded from consideration the statement made by Deoman in the presence of the police officer and the witnesses offering to point out the *gandasa* which he had thrown in the village tank. They held that the story that Deoman had borrowed a *gandasa* in the evening of June 18, 1958, from Mahesh was unreliable. They accepted the conclusions of the Sessions Judge on points (*a*), (*c*), and (*d*) and also on point (*e*) in so far as it related to the production by Deoman in the presence of the police officer and search witnesses of the *gandasa* after wading into the tank, but as in their view, the evidence was insufficient to prove the guilt of Deoman beyond reasonable doubt, they acquitted him of the offence of murder. At the instance of the State of Uttar Pradesh the High Court granted a certificate that "having regard to the general importance of the question as to the constitutional validity of section 27 of the Indian Evidence Act", the case was fit for appeal to this Court.

Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, *i.e.*, of statements made by a person stating or suggesting that he has committed a crime. By section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the Court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under section 24 and complete under section 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in section 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in ***Pakala Narayan***

Swami v. *Emperor*,[1] by the Judicial Committee of the Privy Council, "section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban. Section 26 of the Indian Evidence Act by its first paragraph provides

"No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against a person accused of any offence"

By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immedate presence of a Magistrate. Whereas section 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, section 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in the form of a proviso states

"Provided that, when any fact is deposed to as discovered in consequence of Information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved"

The expression, "accused of any offence" in section 27 as in section 25, is also descriptive of the person concerned, *i.e.*, against a person who is accused of an offence under section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is in the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By section 26, a confession made in the presence of a Magistrate is made provable in its entirety.

Section 162 of the Code of Criminal Procedure also enacts a rule of evidence. This section in so far as it is material for purposes of this case, prohibits, but not so as to affect the admissibility of information to the extent permissible under section 27 of the Evidence Act, use of statements by any person to a police officer in the course of an investigation under Chapter XIV of the Code, in any enquiry or trial in which such person is charged for any offence, under investigation at the time when the statement was made.

On an analysis of sections 24 to 27 of the Indian Evidence Act, and section 162 of the Code of Criminal Procedure, the following material propositions emerge:—

1. (1939) 1 M.L.J. 756 : L.R. 66 I.A. 66 (P.C.).

(*a*) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by inducement, threat or promise having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.

(*b*) A confession made by a person whilst he is in the custody of a police officer to a person other than a police officer is not provable in a proceeding in which he is charged with the commission of an offence unless it is made in the immediate presence of a Magistrate.

(*c*) That part of the information given by a person whilst in police custody whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.

(*d*) A statement whether it amounts to a confession or not made by a person when he is not in custody, to another person such latter person not being a police officer may be proved if it is otherwise relevant.

(*e*) A statement made by a person to a police officer in the course of an investigation of an offence under Chapter XIV of the Code of Criminal Procedure, cannot except to the extent permitted by section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when the statement was made in which he is concerned as a person accused of an offence.

A confession made by a person not in custody is therefore admissible in evidence against him in a criminal proceeding unless it is procured in the manner described in section 24, or is made to a police officer. A statement made by a person, if it is not confessional is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is to the extent to which it distinctly relates to a fact thereby discovered is made provable, by section 162 of the Code of Criminal Procedure, such information given by a person not in custody to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. It is manifst that the class of persons who needed protection most were those in the custody of the police and persons not in the custody of police did not need the same degree of protection. But by the combined operation of section 27 of the Evidence Act and section 162 of the Code of Criminal Procedure, the admissibility in evidence against a person in a criminal proceeding of a statement made to a police officer leading to the discovery of a fact depends for its determination on the question whether he was in custody at the time of making the statement. It is provable if he was in custody at the time when he made it, otherwise it is not.

Are persons in custody, by this distinction deprived of "equality before the law, or the equal protection of the laws" within the meaning of Article 14 of the Constitution? By the equal protection of the laws guaranteed by Article 14 of the Constitution, it is not predicated that all laws must be uniform and universally applicable; the guarantee merely forbids improper or invidious distinctions by conferring rights or privileges upon a class of

persons arbitrarily selected from out of a larger group who are similarly circumstanced, and between whom and others not so favoured, no distinction reasonably justifying different treatment exists: it does not give a guarantee of the same or similar treatment to all persons without reference to the relevant differences. The State has a wide discretion in the selection of classes amongst persons, things or transactions for purposes of legislation. Between persons in custody and persons not in custody, distinction has evidently been made by the Evidence Act in some matters and they are differently treated. Persons who were, at the time when the statements sought to be proved were made, in custody have been given in some matters greater protection compared to persons not in custody. Confessional or other statements made by persons not in custody may be admitted in evidence, unless such statements fall within sections 24 and 25 whereas all confessional statements made by persons in custody except those in the presence of a Magistrate are not provable. This distinction between persons in custody and persons not in custody, in the context of admissibility of statements made by them concerning the offence charged cannot be called arbitrary, artificial or evasive: the legislature has made a real distinction between these two classes, and has enacted distinct rules about admissibility of statements confessional or otherwise made by them.

There is nothing in the Evidence Act which precludes proof of information given by a person not in custody which relates to the facts thereby discovered; it is by virtue of the ban imposed by section 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Chapter XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance. When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of section 27 of the Indian Evidence Act: *Legal Remembrancer* v. *Lalit Mohan Singh*[1] *Santokhi Beldar* v. *King Emperor*[2] Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer. But in considering whether a statute is unconstitutional on the ground that the law has not given equal treatment to all persons similarlly circumstanced, it must be remembered that the Legislature has to deal with practical problems; the question is not to be judged by merely enumerating other theoretically possible situations to which the statute might have been but is not applied. As has often been said in considering whether there has been a denial of the equal protection of the laws,

1. I.L.R 49 Cal. 167. 2. (1933) I.L.R. 12 Pat. 241.

a doctrinaire approach is to be avoided. A person who has committed an offence, but who is not in custody, normally would not without surrendering himself to the police give information voluntarily to a police officer investigating the commission of that offence leading to the discovery of material evidence supporting a charge against him for the commission of the offenc. The Parliament enacts laws to deal with practical problems which are likely to arise in the affairs of men. Theoretical possibility of an offender not in custody because the police officer investigating the offence has not been able to get at any evidence against him giving information to the police officer, without surrendering himself to the police which may lead to the discovery of an important fact by the police, cannot be ruled out; but such an occurrence would indeed be rare. Our attention has not been invited to any case in which it was even alleged that information leading to the discovery of a fact which may be used in evidence against a person was given by him to a police officer in the course of investigation without such person having surrendered himself. Cases like *Deonandan Dusadh* v. *King Emperor*[1] *Santokhi Beldar* v. *King Emperor*[2] *Durly Namasudra* v. *Emperor*[3] In re *Mottai Thevar*,[4] In re *Peria Guruswami*,[5] *Bharosa Ramdayal* v. *Emperor*[6] and *Jalla* v. *Emperor*[7] and others to which our attention was invited are all cases in which the accused persons who made statements leading to discovery of facts were either in the actual custody of police officers or had surrendered themselves to the police at the time of, or before making the statements attributed to them, and do not illustrate the existence of a real and substantial class of persons not in custody giving information to police officers in the course of investigation leading to discovery of facts which may be used as evidence against those persons.

In that premise and considered in the background that "persons in custody" and "persons not in custody" do not stand on the same footing nor require identical protection, is the mere theoretical possibility of some degree of inequality of the protection of the laws relating to the admissibility of evidence between persons in custody and persons not in custody by itself a ground of striking down a salutary provision of the law of evidence?

Article 14 of the Constitution of India is adopted from the last clause of section 1 of the 14th Amendment of the Constitution of the United States of America, and it may reasonably be assumed that our Constituent Assembly when it enshrined the guarantee of equal protection of the laws in our Constitution, was aware of its content delimited by judicial interpretation in the United States of America. In considering the authorities of the superior Courts in the United States, we would not therefore be incorporating principles foreign to our Constitution, or be proceeding upon the slippery ground of apparent similarity of expressions or concepts in an alien jurisprudence developed by a society whose approach to similar problems on account of historical or other reasons differ from ours. In *West Coast Hotel Company* v. *Parrish*[8] in dealing with the content of the guarantee of the esual protection of the laws, Hughes C. J., observed at page 400:—

"This Court has frequently held that the legislative authority, acting within its proper filed, is not bound to extend its regulation to all cases which it might possibly reach. The Legislature "is free to recognise degree of harm and it may confine its restrictions to those classes of cases were the need is deemed to be clearest." If "the law presumably hits the evil where it is most felt, it is no

1. (1928) I.L.R. 7 Pat. 411.
2. (1933) I.L.R. 12 Pat. 241.
3. (1932) I.L.R. 59 Cal. 1040.
4. (1951) 2 M.L.J. 605 : A.I.R. 1952 Mad. 586.
5. (1941) 2 M.L.J. 209 : I.L.R. (1942) Mad. 77.
6. I.L.R. (1940) Nag. 679.
7. A.I.R. 1931 Lah. 278.
8. (1936) 300 U.S. 379.

to be overthrown because there are other instances to which it might have been applied." There is no " doctrinaire requirement " that the legislation should be couched in all embracing terms. "

Holmes, J., in *Weaver* v. *Palmer Bros. Co.*[1] in his dissenting judgment observed:—

" A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm. " If the law presumably hits the evil, where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. " *Miller* v. *Wilson.*[2]

McKenna, J., in *Health and Miligan Manufacturing Co.* v. *Worst*[3] observed:

" Classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it results in 'ill-adivised, unequal, and oppressive legislation'. . . . . . . .Exact wisdom and nice adaption of remedies are not required by the 14th Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it."

Sections 25 and 26 are manifestly intended to hit at an evil, *viz.*, to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing offences as it is concerned with protecting persons who may be compelled to give confessional statements. If section 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule. The principle of admitting evidence of statements made by a person giving information leading to the discovery of facts which may be used in evidence against him is manifestly reasonable. The fact that the principle is restricted to persons in custody will not by itself be a ground for holding that there is an attempted hostile discrimination because the rule of admissibility of evidence is not extended to a possible, but an uncommon or abnormal class of cases.

Counsel for the defence contended that in any event Deoman was not at the time when he made the statement attributed to him, accused of any offence and on that account also apart from the constitutional plea, the statement was not provable. This contention is unsound. As we have already observed, the expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by section 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applcability.

In that view, the High Court was in error in holding that section 27 of the Indian Evidence Act and section 162, sub-section (2) of the Code of Criminal Procedure in so far as "that section relates to section 27 of the Indian Evidence Act" are void as offending Article 14 of the Constitution.

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1. (1925) 270 U.S. 402.
2. (1914) 236 U.S. 373.
3. (1907) 207 U.S. 338.

The High Court acquitted Deoman on the ground that his statement which led to the discovery of the *gandasa* is inadmissible. As we differ from the High Court on that question, we must proceed to review the evidence in the light of that statement in so far as it distinctly relates to the fact thereby discovered being admissible.

The evidence discloses that Deoman and his uncle, Mahabir, were anxious to dispose of the property of Sukhdei and of Dulari and Sukhdei obstructed such disposal. In the evening of June 18, 1958, there was an altercation between Sukhdei and Deoman over the proposed disposal of the property, in the presence of witnesses, Shohbnath and Mahesh. At that time, Deoman slapped Sukhdei and threatened that he would "smash her mouth". In the morning of the June 19, 1958, the dead body of Sukhdei with several incised injuries caused by a *gandasa* was found lying in her courtyard. Deoman was seen in the village on that day early in the morning hurrying towards the village tank and 'taking a bath', but thereafter he absconded from the village and was not found till sometime in the afternoon of the 20th. In his examination by the Court, he has stated that he had left Anandadih early in the morning of the 19th June on business and that he was not absconding, but there is no evidence in support of that plea. The evidence discloses that in the presence of witnesses, Shobhnath and Raj Bahadur Singh, Deoman waded into the village tank and "fetched the *gandasa*" which was lying hidden in the mud at the bottom of the tank and that *gandasa* was found by the Serologist on examination to be stained with human blood. The High Court has agreed with the findings of the Trial Court on this evidence. The evidence that Deoman had in the presence of the witnesses, Shobhnath and Raj Bahadur Singh offered to point out the *gandasa* which he said he had thrown into the tank was accepted by the Trial Court and the High Court has not disagreed with that view of the Trial Court, though it differed from the Trial Court as to its admissibility. The evidence relating to the borrowing of the *gandasa* from witness, Mahesh, in the evening of the 18th June, 1958, by Deoman has not been accepted by the High Court and according to the settled practice of this Court, that evidence may be discarded. It was urged that Deoman would not have murdered Sukhdei, because by murdering her, he stood to gain nothing as the properties which belonged to Sukhdei could not devolve upon his wife Dulari in the normal course of inheritance. But the quarrels between Deoman and Sukhdei arose not because the former was claiming that Dulari was heir presumptive to Sukhdei's estate, but because Sukhdei resisted attempts on Deoman's part to dispose of the property belonging to her and to Dulari. The evidence that Deoman slapped Sukhdei and threatened her that he would "smash her face" coupled with the circuumstances that on the morning of the murder of Sukhdei, Deoman absconded from the village after washing himself in the village tank and after his arrest made a statement in the presence of witnesses that he had thrown the *gandasa* in the village tank and produced the same, establishes a strong chain of circumstances leading to the irresistible inference that Deoman killed Sukhdei early in the morning of June 19, 1958. The learned trial Judge held on the evidence that Deoman was proved to be the offender. That conclusion is, in our view, not weakened because the evidence relating to the borrowing of the *gandasa* from witness Mahesh in the evening of June 18, 1958, may not be used against him. The High Court was of the view that the mere fetching of the *gandasa* from its hiding place did not establish that Deoman himself had put it in the tank, and an inference could legitimately be raised that somebody else had placed it in the tank, or that Deoman had seen someone placing that *gandasa* in the tank or that someone had told him about the *gandasa* lying in the tank. But for reasons already set out the information

given by Deoman is provable in so far as it distinctly relates to the fact thereby discovered; and his statement that he had thrown the *gandasa* in the tank is information which distinctly relates to the discovery of the *gandasa*. Discovery from its place of hiding, at the instance of Deoman of the *gandasa* stained with human blood in the light of the admission by him that he had thrown it in the tank in which it was found therefore acquires significance, and destroys the theories suggested by the High Court.

The quarred between Deoman and Sukhdei and the threat uttered by him that he would smash Sukhdei's "mouth" (face) and his absconding immediately after the death of Sukhdei by violence, lend very strong support to the case for the prosecution. The evidence, it is true, is purely circumstantial but the facts proved establish a chain which is consistent only with his guilt and not with his innocence. In our opinion therefore the Sessions Judge was right in his view that Deoman had caused the death of Sukhdei by striking her with the *gandasa* produced before the Court.

On the evidence of the medical officer who examined the dead body of Sukhdei, there can be no doubt that the offence committed by accused Deoman is one of murder. The Trial Judge convicted the accused of the offence of murder and in our view, he was right in so doing. Counsel for Deoman has contended that in any event, the sentence of death should not be imposed upon his client. But the offence appears to have been brutal, conceived and executed with deliberation and not in a moment of passion, upon a defenceless old woman who was the benefactress of his wife. The assault with a dangerous weapon was made only because the unfortunate victim did not agree to the sale of property belonging to her and to her foster child. Having carefully considered the circumstances in which the offence is proved to have been committed, we do not think that any case is made out for not restoring the order imposing the death sentence. We accordingly set aside the order passed by the High Court and restore the order passed by the Court of Session.

It may be observed that the sentence of death cannot be executed unless it is confirmed by the High Court. The High Court has not confirmed the sentence, but in exercise of our powers under Article 136 of the Constitution, we may pass the same order of confirmation of sentence as the High Court is, by the Code of Criminal Procedure, competent to pass. We accordingly confirm the sentence of death.

Subba Rao, J.—I have had the advantage of perusing the judgment of my learned brother, Shah, J. . I regret my inability to agree with his reasoning or conclusion in respect of the application of Article 14 of the Constitution to the facts of the case. The facts have been fully stated in the judgment of my learned brother and they need not be restated here.

Article 14 of the Constitution reads:

"The State shall not deny to any person equality be fore the law or equa protection of the laws within the territories of India".

Das, C.J., in *Basheshar Nath* v. *The Commissioner of Income-tax*,[1] explains the scope of the equality clause in the following terms:

"The underlying object of this Article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws." There, can, therefore, be no doubt

1. (1959) S.C.J. 1207 : A.I.R. 1959 S.C. 149.

or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States. . . . . The command of the Article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy."

This subject has been so frequently and recently before this Court as not to require an extensive consideration. The doctrine of equality may be briefly stated as follows: All persons are equal before the law is fundamental of every civilised constitution. Equality before law is a negative concept; equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well nigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of and the purpose for which it is made.

Das, C.J., in *Shri Ram Kishna Dalmia* v. *Shri Justice S. R. Tendolkar and others*,[1] culled out the rules of construction of the equality clause in the context of the principle of classification from the various decisions of this Court and those of the Supreme Court of the United States of America and restated the settled law in the form of the following propositions at pages 297-298:

"(*a*) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(*b*) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(*c*) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(*d*) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

(*e*) that in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(*f*) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation."

In view of this clear statement of law, it would be unnecessary to cover the ground over again except to add the following caution administered by Brewer, J., in *Gulf Colorado and Santa Fe Rly. Co.* v. *Ellis*[2]

"While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some

1. (1959) S.C.J. 147: (1959) 1 An.W.R. (S.C.) 77: (1959) 1 M.L.J. (S.C.) 77: (1959) S.C.R. 279.
2. (1897) 165 U.S. 666.

undisclosed and unknown reason for subjecting certain individuals or Corporations to hostile and discriminating Legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

It will be seen from the said rules that a weightage is given to the State as against an individual and a heavy burden is thrown on the latter to establish his fundamental right. If the caution administered by Brewer, J., in *Gulf, Colorado and Santa Fe Railway Co.* v. *Ellis*,[1] and restated by Das, C.J., in *Shri Ram Krishna Dalmia's case*,[2] were to be ignored, the burden upon a citizen would be an impossibe one, the rules intended to elucidate the doctrine of equality would tend to exhaust the right itself, and, in the words of Brewer, J., the said concept becomes "a mere rope of sand, in no manner restraining state action". While the Court may be justified to assume certain facts to sustain a reasonable classification, it is not permissible to rest its decision on some undisclosed and unknown reasons; in that event, a Court would not be enforcing a fundamental right but would be finding out some excuse to support the infringement of that right.

It will be convenient at the outset to refer to the relevant sections. Under section 25 of the Evidence Act, no confession made to a police-officer shall be proved as against a person accused of an offence. Section 26 says that no confession made by any person while he is in the custody of a police-officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person. Section 27, which is in the form of a proviso, enacts that

"when any fact is deposed to as discovered in consequence of information received from a person accused of any offence. in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Section 162 of the Code of Criminal Procedure lays down that no statement made by any person to a police officer in the course of an investigation shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. Sub-section (2) of section 162 of the said Code which was amended by section 2 of the Code of Criminal Procedure (Second Amendment) Act, 1941 (Act XV of 1941) provides that the said section shall not affect the provisions of section 27 of the Indian Evidence Act.

A combined effect of the said provisions relevant to the present enquiry may be stated thus: (1) No confession made to a police-officer by an accused can be proved against him; (2) no statement made by any person to a police-officer during investigation can be used for any purpose at any inquiry or trial; (3) a confession made by any person while he is in the police custody to whomsoever made, such as a fellow-prisoner, a doctor or a visitor, can be proved against him if it is made in the presence of a Magistrate; and (4) if a person accused of an offence is in the custody of a police-officer, any information given by him, whether it is a statement or a confession, so much of it as relates distinctly to the fact thereby discovered may be proved. Shortly stated, the section divided the accused making confessions or statements before the police into two groups: (*i*) accused not in custody of the police, and (*ii*) accused who are in the custody of the police. In the case of the former there is a general bar against the admissibility of any confessions or statements made by them from being used as evidence against them; in the case of the latter, so much of such statements or confessions as relates distinctly to the fact thereby discovered is made admissible.

1. (1897) 165 U.S. 666.
2. (1959) S.C.J. 147: (1959) 1 An.W.R. (S.C.) 77: (1959) 1 M.L.J. (S.C.) 77: (1959) S.C.R. 279.

Shorn of the verbiage, let us look at the result brought about by the combined application of section 27 of the Evidence Act and section 162 of the Code of Criminal Procedure. *A* and *B* stabbed *C* with knives and hid them in a specified place. The evidence against both of them is circumstantial. One of the pieces of circumstantial evidence is that both of them gave information to the police that each of them stabbed *C* with a knife and hid it in the said place. They showed to the police the place where they had hidden the knives and brought them out and handed them over to the police; and both the knives were stained with human blood. Excluding this piece of evidence, other pieces of circumstantial evidence do not form a complete chain. If it was excluded, both the accused would be acquitted; if included, both of them would be convicted for murder. But *A*, when he gave the information was in the custody of police, but *B* was not so. The result is that on the same evidence *A* would be convicted for murder but *B* would be acquitted: one would lose his life or liberty and the other would be set free. This illustration establishes that *prima facie* the provisions of section 27 of the Evidence Act accord unequal and uneven treatment to persons under like circumstances.

Learned Additional Solicitor-General tries to efface this apparent vice in the sections by attempting to forge a reasonable basis to sustain the different treatment given to the two groups of accused. His argument may be summarized thus: Accused are put in two categories, namely, (1) accused in custody; and (2) accused not in custody. There are intelligible differentia between these two categories which have reasonable relation to the objects sought to be achieved by the legislature in enacting the said provisions. The legislature has two objects, *viz.*, (*i*) to make available to the Court important evidence in the nature of confessions to enable it to ascertain the truth; and (*ii*) to protect the accused in the interest of justice against coercive methods that may be adopted by the police. The differences between the two categories relating to the objects sought to be achieved are the following: (*a*) while extra-judicial confessions in the case of an accused not in custody are admissible in evidence, they are excluded from evidence in the case of accused in custody; (*b*) compared with the number of accused in the custody of the police who make confessions or give information to them, the number of accused not in custody giving such information or making confessions would be insignificant; (*c*) in the case of confesson to a police-officer by an accused not in custody, no caution is given to him before the confession is recorded, whereas in the case of an accused in custody, the factum of custody itself amounts to a caution to the accused and puts him on his guard; and (*d*) protection by the imposition of a condition for the admissibility of confessions is necesary in the case of accused in custody; whereas no such protection for accused not in custody is called for. Because of these differences between the two categories, the argument proceeds, the classification made by the legislature is justified and takes the present case out of the operation of Article 14 of the Constitution.

I shall now analyse each of the alleged differences between the two categories of accused to ascertain whether they afford a reasonable and factual basis for the classification.

Re. (*a*): Whether the accused is in custody or not in custody, the prosecution is not prevented from collecting the necessary evidence to bring home the guilt to the accused. Indeed, as it often happens, if the accused is not in custody and if he happens to be an influential person there is a greater likelihood of his retarding and obstructing the progress of investigation and the

collection of evidence. Nor all the extra-judicial confessions are excluded during the trial after a person is put in custody. The extra-judicial confession made by an accused before he is arrested or after he is released on bail is certainly relevant evidence to the case. Even after a person is taken into custody by a police-officer, nothing prevents that person from making a confession to a third-party and the only limitation imposed by section 26 of the Evidence Act is that he shall make it only in the presence of a Magistrate. The confession made before a Magistrate after compliance with all the formalities prescribed has certainly greater probative force than that made before outsiders. On the other hand, though extra-judicial confessions are relevant evidence, they are received by Courts with great caution. That apart, it is a pure surmise that the legislature should have thought that the confession of an accused in custody to a police-officer with a condition attached would be a substitute for an extra-judicial confession that he might have made if he was free. Broadly speaking, therefore, there is no justification for the suggestion that the prosecution is in a better position in the matter of establishing its case when the accused is out of custody than when he is in custody. Moreover, this circumstance has not been relied upon by the State in the High Court but is relied upon for the first time by learned counsel during his arguments. In my view, there is no practical difference at all in the matter of collecting evidence between the two categories of persons and that the alleged difference cannot reasonably sustain a classification.

Re. (*b*): The second circumstance relied upon by the learned counsel leads us to realms of fancy and imagination. It is said that the number of persons not in custody making confessions to the police is insignificant compared with those in custody and, therefore, the legislature may have left that category out of consideration. We are asked to draw from our experience and accept the said argument. No such basis was suggested in the High Court. The constitutional validity has to be tested on the facts existing at the time the section or its predecessor was enacted buit not on the consequences flowing from its operation. When a statement made by accused not in the custody of police is statutorily made inadmissible in evidence, how can it be expected that many such instances will fall within the ken of Courts. If the ban be removed for a short time it will be realized how many such instances will be pouring in the same way as confessions of admissible type have become the common feature of almost every criminal case involving grave offence. That apart, it is also not correct to state that such confessions are not brought to the notice of Courts.

In re *Mottai Thevar*[1] deals with a case where the accused immediately after killing the deceased goes to the police station and makes a clear breast of the offence. In *Durlay Namasudra* v. *King Emperor*[2] the information received from an accused not in the custody of a police-officer which lead to the discovery of the dead-body was sought to be put in evidence. Before a division bench of the Patna High Court in *Deonandan Dusadh* v. *King Emperor*[3] the information given to the Sub-Inspector of Police by a husband who had fatally assaulted his wife which led to the discovery of the corpse of the woman was sought to be admitted in evidence. In *Santhokhi Beldar* v. *King Emperor*[4] a Full Bench the Patna High Court was considering whether one of the pieces of evidence which led to the discovery of blood-stained knife and other articles by the Sub-Inspector of Police at the instance of the accused was admissible against

1. (1951) 2 M.L.J 605 : A.I.R. 1952 Mad. 586.
2. (1932) I.L.R. 59 Cal. 1040.
3. (1928) I.L.R. 7 Pat. 411.
4. (1933) I.L.R. 12 Pat. 241 (F.B.).

the informant. A statement made by an accused to a responsible police-officer voluntarily confessing that he had committed an act of crime was considered by a division bench of the Nagpur High Court in *Bharosa Ramdayal* v. *Emperor.*[1] The Lahore High Court in *Jalla* v. *Emperor*[2] had before it a statement made by an accused to the police which led to the discovery of the dead-body. In re *Peria Guruswamy and another*[3] is a decision of a division bench of the Madras High Court wherein the question of admissibility of a confession made by a person to a police-officer before he came into his custody was considered.

I have cited the cases not for considering the validity of the questions decided therein, namely, when a person can be described as an accused and when he can be considered to have come into the custody of the police, but only to controvert the argument that such confessions are in practice non-existent. I have given only the representative decisions of various High Courts and I am sure if a research is made further instances will be forthcoming.

The historical background of section 27 also does not warrant any assumption that the legislature thought that cases of persons not in custody of a police-officer making confessions before him would be very few and, therefore, need not be provided for. Sections 25, 26 and 27 of the Evidence Act correspond to sections 148, 149 and 150 of the Code of Criminal Procedure of 1861. Section 148 of the Code prohibited the use as evidence of confessions or admissions of guilt made to a police-officer. Section 149 provided:

> " No confession or admission of guilt made by any person while he is in the custody of a police-officer unless it be made in the immediate presence of a Magistrate shall be used as evidence against such person. "

Section 150 stated:

> " When any fact is deposed to by a police-officer as discovered by him in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact discovered by it, may be received in evidence. "

Section 150 of the Code of 1861 was amended by Act VIII of 1869 and the amended section read as follows:

> " Provided that when any fact is deposed to in evidence as discovered in consequence of information received from a person accused of any offence *or* in the custody of a police-officer, so much of such information, whether it amounts to a confession or admission of guilt or not, as relates distinctly to the fact thereby discovered, may be received in evidence. "

It would be seen from the foregoing sections that there was an absolute bar against the admissibility of confessions or admissions made by any person to a police-officer and that the said bar was partially lifted in a case where such information, whether it amounted to a confession or admission of guilt, related distinctly to the fact discovered. The proviso introduced by Act VIII of 1869 was in *pari materia* with the provisions of section 27 of the Evidence Act with the difference that in the earlier section the phrase "a person accused of any offence" and the phrase "in the custody of a polic-officer" were connected by the disjunctive "or". The result was that no discrimination was made between a person in custody or out of custody making a confession to a police-officer. Section 150 of the Code before amendment also, though it was couched in different terms, was similar in effect. It follows that, at any rate till the year 1872, the intention of the legislature was to provide for all confessions made by persons to the police whether in custody of the police or not. Can it be said

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1. A.I.R. 1941 Nag. 86.
2. A.I.R. 1931 Lah. 278.
3. (1941) 2 M.L.J. 209 : I.L.R. (1942) Mad. 77 : A.I.R. 1941 Mad. 765.

that in 1872 the Legislature excluded confessions or admissions made by a person not in custody to a police-officer from the operation of section 27 of the Evidence Act on the ground that such cases would be rare? Nothing has been placed before us to indicate the reasons for the omission of the word "or" in section 27 of the Evidence Act. If that be the intention of the Legislature, why did it enact section 25 of the Evidence Act imposing a general ban on the admissibility of all confessions made by accused to a police officer? Section 27 alone would have served its purpose. On the other hand, section 25 in express terms provides for the genus, *i.e.*, accused in general, and section 27 provides for the species out of the genus, namely, accused who are in custody. A general ban is imposed by one section and it is lifted only in favour of a section of accused of the same class. The omission appears to be rather by accident than by design. In the circumstances it is not right to speculate and hold that the Legislaure consciously excluded from the operation of section 27 of the Act accused not in custody on the ground that they were a few in number.

During the course of the arguments of the learned counsel for the respondent, to the question put from the Bench whether an accused who makes a confession of his guilt to a police-officer would not by the act of confession submit himself to his custody, the learned counsel answered that the finding of the High Court was in his favour, namely, that such a confession would not bring about that result. Learned Additional Solicitor-General in his reply pursued this line of thought and contended that in that event all possible cases of confession to a police-officer would be covered by section 27 of the Evidence Act. The governing section is section 46 of the Code of Criminal Procedure, which reads:

"(1) In making the arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there by a submission to the custody by word or action."

....

It has been held in some decision that

"when a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence, and if he makes the statement to a police-officer, as such, he submits to the custody of the officer within the meaning of clause (1) of this section and is then in the custody of a police-officer within the meaning of section 27 of the Evidence Act."

But other cases took a contrary view. It is not possible to state as a proposition of law what words or what kind of action bring about submission to custody; that can only be decided on the facts of each case. It may depend upon the nature of the information, the circumstances under, the manner in, and the object for, which it is made, the attitude of the police-officer concerned and such other facts. It is not, therefore, possible to predicate that every confession of guilt or statement made to a police-officer automatically brings him into his custody. I find it very difficult to hold that in fact that there would not be any appreciable number of accused making confessions or statements outside the custody of a police-officer. Giving full credit to all the suggestions thrown out during the argument, the hard core of the matter remains, namely, that the same class, *i.e.*, accused making confessions to a police-officers, is divided into two groups—one may be larger than the other—on the basis of a distinction without difference.

Let me now consider whether there is any textual or decided authority in support of the contention that the Legislature can exclude from the operation of section 27 accused not in custody on the ground that they are a few in number.

In support of this contention learned counsel for the appellant cited a decision of this Court and some decisions of the Supreme Court of the United States of America. The decision of this Court relied upon is that in *Sakhawat Ali* v. *The State of Orissa*.[1] In that case, Bhagwati, J., observed at page 1010 thus:

"The simple answer to this contention is that legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories which would stand on the same footing as those which are covered by the legislation are left out would not render legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution."

These observations, though at first sight appear to support the appellant, if understood in the context of the facts and the points decided in that case, would not in any way help him. By the provisions of section 16 (1) (x) of the Orissa Municipal Act, 1950, a paid legal practitioner on behalf of or against the Municipality is disqualified for election to a seat in such Municipality. One of the questions raised was that the said section violates the fundamental right of the appellant under Article 14 of the Constitution. The basis of that argument was that the classification made between legal practitioners who are employed on payment on behalf of the Municipality or who act against the Municipality and those legal practitioners who are not so employed was not reasonable. Bhagwati, J., speaking for the Court, stated the well-settled principles of classification and gave reasons justifying the classification in the context of the object sought to be achieved thereby. But it was further argued in that case that the Legislature should have also disqualified other persons, like clients, as even in their case there woud be conflict between interest and duty. Repelling that contention the learned Judge made the aforesaid observations. The said observations could only mean that, if there was intelligible differentia between the species carved out of the genus for the purpose of legislation, in the context of the object sought to be achieved, the mere fact that the legislation could have been extended to some other persons would not make the legislation constitutionally void. On the other hand, if the passage be construed in the manner suggested by learned counsel for the appellant, it would be destructive of not only the principle of classification but also of the doctrine of equality.

Nor do the American decisions lay down any such wide proposition. In *John A. Watson* v. *State of Maryland*[2], the constitutional validity of Maryland Code of 1904 which made it a misdemeanour for any doctor to practise medicine without registration, was challenged. The said Code exempted from its operation physicians who were then practising in that State and had so practised prior to January 1, 1898, and could prove that within one year of the said date they had treated at least twelve persons in their professional capacity. The Supreme Court of America affirmed the validity of the provision. The reason for the classification is stated at page 989 thus:

"Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties."

Then the learned Judge proceeded to state:

"Such exceptions proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination before a board of medical experts."

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1. (1955) S.C.J. 262 : (1955) 1 S.C.R. 1004. 2. (1909) 54 Law. Ed. 987.

The classification is, therefore, not sustained upon any mathematical calculation but upon the crcumstance that the groups excluded were experienced doctors whereas those included were not. In *Jeffrey Manufacturing Company* v. *Harry O. Blagg*[1] the Supreme Court of America justified a classification under Ohio Workmen's Compensation Act which made a distinction between employers of shops with five or more employees and employers of shops having a lesser number of employees. Employers of the former class had to pay certain premiums for the purpose of establishing a fund to provide for compensation payable under the said Act. If an employer did not pay the premium, he would be deprived of certain defences in a suit filed by his employee for compensation. It was contended that this discriminaton offended the provisions of the 14th Amendment of the Constitution. Day, J., sustained the classification on the ground that the negligence of a fellow servant is more likely to be a cause of injury in the large establisments, employing many in their service than in smallar ones. It was also conceded that the State legislature was not guilty of arbitrary classification. It is, therefore, manifest that the classification was not based upon numerical strength but on the circumstance that the negligence of a fellow servant is more likely to happen in the case of larger establishments. The passage at page 369 must be understood in the ight of the facts and the concession made in that case. The passage runs thus:

> "................having regard to local conditions, of which the (State Legislature) must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it, and embraced all the establishments of the state of any size, and that those so small as . c employ only four or less might be regarded as a negligible quantity, and need not be assessed to make up the guaranty fund, or covered by the methods of compensation which are provided by this legislation."

The passage presupposes the existence of a classification and cannot, in my view, support the argument that an arbitrary classification shall be sustained on the ground that the Legislature in its wisdom covered the field where the protection, in its view, was needed. Nor the observations of McKenna, J., in *St. Louis, Iron Mountain and Southern Railway Company* v. *State of Arkansas*[2], advance the case of the appellant. The learned Judge says at page 779 thus:

> "We have recognised the impossibility of legislation being all comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."

In that case the State Legislature made an exemption in favour of railways less than 100 miles in length from the operation of the statute forbidding railway companies, with yards or terminals in cities of the state to conduct switching operations across public crossings in cities of the first or second class with a switching crew of less than one engineer, a fireman, a foreman, and three helpers. McKenna, J., sustained its constitutional validity holding that the classification was not arbitrary. The observations cited do not in any way detract from the well-established doctrine of classification, but only lay down that the validity of a classification must be judged not on abstract theories but on practical considerations. Where the Legislature prohibited the use of shoddy, new or old, even when sterilized, in the manufacture of comfortables for beds, the Supreme Court of America held in *Weaver* v. *Palmer Brothers Co.*,[3] that the prohibition was not reasonable. It was held that constitutional guarantees may not be made to yield to mere convenience. Holmes, J., in his dissenting judgment observed at page 659 thus:

1. 59 Law. Ed. 364.
2. 60 Law. Ed. 776.
3. 70 Law. Ed. 654.

"A classification is not to be pronounced arbitrary because it goes on practical grounds and attacks only those objects that exhibit or foster an evil on a large scale. It is not required to be mathematically precise and to embrace every case that theoretically is capable of doing the same harm".

Even this dissenting opinion says nothing more than that, in ascertaining the reasonableness of a classification, it shall be tested on practical grounds and not on theoretical considerations. In *West Coast Hotel Company* v. *Parrish*[1], a state statute authorized the fixing of reasonable minimum wages for women and minors by State authority, but did not extend it to men. In that context, Hughes, C.J., observed at page 713 thus:

"This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach."

These observations assume a valid classification and on that basis state that a legislation is not bound to cover all which it might possibly reach.

A neat summary of the American law on the subject is given in "The Constitution of the United States of America", prepared by the Legislative Reference Service, Library of Congress (1952 Edn.) at page 1146 thus:

"The Legislature is free to recognize degrees of harm; a law which hits the evil where it is most felt will not be overthrown because there are other instances to which it might have been applied. The State may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rules laid down were made mathematically exact. Exceptions of specified classes will not render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted classes."

These observations do not cut across the doctrine of classification, but only afford a practical basis to sustain it. The prevalence of an evil in one field loudly calling for urgent mitigation may distinguish it from other field where the evil is incipient. So too, the deleterious effect of a law on the public, if it is extended to the excluded group, marks it off from the included group. Different combination of facts with otherwise apparently identical groups so accentuate the difference as to sustain a classification. But if the argument of the learned counsel, namely, that the Legislature can in its discretion exclude some and include others from the operation of the Act in spite of their identical characteristics on the ground only of numbers be accepted, it will be destructive of the doctrine of equality itself.

Therefore, the said and similar decisions do not justify classification on the basis of numbers or enable the Legislature to include the many in and exclude the few from the operation of law without there being an intelligible differentia between them. Nor do they support the broad contention that a Legislature in its absolute discretion may exclude some instances of identical characteristics from an Act on alleged practical considerations. Even to exclude one arbitrarily out of a class is to offend against Article 14 of the Constitution.

Let us now apply the said principles to the facts of the present case. Assuming for a moment that the ratio between the accused in the context of confessions is 1000 in custody and 5 out of custody, how could that be conceivably an intelligible ground for classification? Assuming again that the Legislature thought—such an exemption is unwarranted—that such cases would not arise at all and need not be provided for, could that be a reasonable assumption having regard to the historical background of section 27 of the Evidence

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1. 81 Law Ed. 703.

Act and factual existence of such instances disclosed by decisions citted *supra* As I have already stated that such an exemption is an unwarranted flight into the realms of imagination in the teeth of expressed caution administered by Das, C. J., in *Shri Ram Krishna Dalmia's case*[1] and by Brewer, J., in *Gulf, Colorado and Santa Fe Rly. Co.* v. *Ellis*.[2]

Re. (*c*): Nor I find any intelligible differentia in the caution alleged to be implied by accused being taken into custody. The argument is that under section 163 of the Code of Criminal Procedure

"no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under this chapter any statement which he may be disposed to make of his own free will,"

and as an accused is allowed to make any statement he chooses without his being placed on guard by timely caution, no statement made by him is permitted to be proved; whereas by the accused being taken into custody, the argument proceeds, by the said act itself the accused gets sufficient warning that his statement may be used in evidence and that this difference affords a sufficient basis for the classification. I am not satisfied that taking into custody amounts to a statutory or implied caution. If that be the basis for the distinction, there is no justification that an accused once taken into custody but later released on bail should not be brought in within the meaning of section 27 of the Evidence Act.

Re. (*d*): The fourth item of differentia furnishes an ironical commentary on the argument advanced. The contention is that an accused in custody needs protection in the matter of his confession and therefore a condition is imposed before the confession is made admissible. There is an obvious fallacy underlying this argument. The classification is made between accused not in custody making a confession and accused in custody making a confession to a police-officer: the former is inadmissible and the latter is admissible subject to a condition. The point raised is why should there be this discrimination between these two categories of accused? It is no answer to this question to point out that in the case of an accused in custody a condition has been imposed on the admissibility of his confession. The condition imposed may be to some extent affording a guarantee for the truth of the statement, but it does not efface the clear distinction made between the same class of confessions. The vice lies not in the condition imposed, but in the distinction made between these two in the matter of admissibility of a confession. The distinction can be wiped out only when confessions made by all accused are made admissible subject to the protective condition imposed.

Not only the alleged differentia are not intelligible or germane to the object sought to be achieved, the basis for the distinction is also extremely arbitrary, There is no acceptable reason why a confession made by an accused in custody to a police-officer is to be admitted when that made by an accused not in custody has to be rejected. The condition imposed in the case of the former may, to some extent, soften the rigour of the rule, but it is irrelevant in considering the question of reasonableness of the classification. Rankin, J., in *Durlay Namasudra* v. *Emperor*[3], in a strongly worded passage criticised the anomaly underlying section 27 thus at page 1045:

"...... in a case like the present where the confession was made to the police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though something was discovered as a result of it. ....It cannot be admitted

1. (1959) S.C.J. 147: (1959) 1 An.W.R. (S.C.) 77: (1959) 1 M.L.J. (S.C.) 77: (1959) S.C.R. 279.
2. (1897) 165 U.S. 666.
3. (1932) I.L.R. 59 Cal. 1040.

in evidence, because the man was not in custody, which of course is thoroughly absurd. There might be reason in saying that, if a man is in custody, what he may have said cannot be admitted ; but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody."

In the present case, the self-same paradox is sought to be supported as affording a reasonable basis for the classification.

The only solution is for the Legislature to amend the section suitably and not for this Court to discover some imaginary ground and sustain the classification. I, therefore, hold that section 27 of the Evidence Act is void as violative of Article 14 of the Constitution.

If so, the question is whether there is any scope for intereference with the finding of the High Court. The High Court considered the entire evidence and found the following circumstances to have been proved in the case:

(a) "that in the evening of 18th June, 1958, there was an altercation between Sukkhdei and Deoman, accused, over the proposed transfer of property in Anandadih, in the presence of Shobh Nath (P.W. 5) and Mahesh (P.W. 7), and that in the course of this altercation Deoman slapped her and threatened that he would smash her mouth ;"

(b) "that at about dawn on 19th June, 1958, the accused was seen by Khusai (P.W. 8) hurrying towards a tank, and shortly afterwards was seen by Mata Dihal (P.W. 11) actually bathing in that tank, before it was fully light" ;

(c) "that the accused absconded immediately afterwards and was not to be found a Anandadih on 19th June, 1958" ; and

(d) "that on 21st June, 1958, the accused in the presence of the investigating officer (P.W. 14) Shobh Nath (P.W. 5) and Raj Bahadur Singh (P.W. 6) stated that he could hand over the "*gandasa*" which he had thrown into a tank ; that he was then taken to that tank and in the presence of the same witnesses waded in and fetched the "*gandasa*" Exhibit 1 out of the water ; and that this *gandasa* was found by the Chemical Examiner and Serologist to be stained with human blood".

The High Court held that the said circumstances are by no means sufficient to prove the guilt of the accused-appellant beyond reasonable doubt. On that finding, the High Court gave the benefit of doubt to the accused and acquitted him of the offence. The finding is purely one of fact and there are no exceptional circumstances in the case to disturb the same.

In the result, the appeal fails and is dismissed.

Hidayatullah, J.—The facts of the case have been stated in full by Shah, J., in the judgment which he has delivered, and which I had the advantage of reading. I have also had the advantage of reading the judgment of Subba Rao, J. I respectfully agree generally with the conclusions and the reasons, therefor, of Shah, J. I wish, however, to make a few observations.

Section 27 of the Indian Evidence Act is in the Chapter on admissions and forms part of a group of sections which are numbered 24 to 30. and these sections deal with confessions of persons accused of an offence. They have to be read with sections 46 and 161-164 of the Code of Criminal Procedure.

Section 24 makes a confession irrelevant if the making of it appears to the Court to have been caused by inducement, threat or promise having reference to the charge against the accused persons, from a person in authority and by which the accused person hopes that he would gain some advantage or avoid some evil of a temporal nature in reference to the proceedings against him. Section 25 makes a confession to a police officer inadmissible against a person accused of any offence. Section 26 says that no confession made by a person whilst he is in the custody of a police-officer shall be proved unless it be made in the immediate presence of a Magistrate. Section 27 then provides·

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact therey discovered, may be proved."

Section 161 of the Code of Criminal Procedure empowers a police-officer of stated rank to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person is bound to answer all questions relating to the case but not questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The police-officer may make a written record of the statement. Section 163 of the Code then lays down the rule that no police-officer or other person in authority shall offer or make, or cause to be offered or made, any inducement, threat or promise as is mentioned in the Indian Evidence Act, section 24, and further that no police-officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation any statement which he may be disposed to make of his own free will. Section 162 of the Code then makes statements reduced into writing inadmissible for any purpose except those indicated, but leaves the door open for the operation of section 27 of the Indian Evidence Act. Section 164 confers the power to record confessions, on Magistrates of stated rank during investigation or at any time afterwards before the commencement of the enquiry or trial. Such confessions are to be recorded after due caution to the person making the confession and only if there is reason to believe that they are voluntary. Section 46 of the Code provides that in making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

When an offence is committed and investigation starts, the police have two objects in view. The first is the collection of information, and the second is the finding of the offender. In this process, the police question a number of persons, some of whom may be only witnesses and some who may later figure as the person or persons charged. While questioning such persons, the police may not caution them and the police must leave the persons free to make whatever statements they wish to make. There are two checks at this stage. What the witnesses or the suspects say is not to be used at the trial, and a person cannot be compelled to answer a question, which answer may incriminate him. It is to be noticed that at that stage though the police may have suspicion against the offender, there is no difference between him and other witnesses, who are qustioned. Those who turn out to be witnesses and not accused are expected to give evidence at the trial and their former statements are not evidence. In so far as those ultimately charged are concerned, they cannot be witnesses, save exceptionally, and their statements are barred under section 162 of the Code and their confessions, under section 24 of the Indian Evidence Act. Their confessions are only relevant and admissible, if they are recorded as laid down in section 164 of the Code of Criminal Procedure after due caution by the Magistrate and it is made clear that they are voluntary. These rules are based upon the maxim: *Nemo tenetur prodere seipsum* (no one should be compelled to incriminate himself). In an address to Police Constables on their duties, Hawkins, J., (later, Lord Brampton) observed:

"Neither Judge, Magistrate nor juryman, can interrogate an accused person. . . . or require him to answer to the questions tending to incriminate himself. Much less, then ought a Constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody."

In English law, the statement of an accused person can be tendered in evidence, provided he has been cautioned and the exact words of the accused are deposed to. Says Lord Brampton:

"There is, however, no objection to a Constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence, nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him, that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him. Perhaps the best maxim with respect to an accused person is '*Keep your ears and eyes open, and your mouth shut*'. *See* Sir Howard Vincent's "Police Code".

In *Ibrahim* v. *Emperor*,[1] Lord Sumner gave the history of rules of common law relating to confessions, and pointed out that they were "as old as Lord Hale". Lord Sumner observed that in *Reg.* v. *Thomposn*[2] and earlier in *Rex* v. *Warrickshall*,[3] it was ruled (to quote from the second case):

"A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it."

Lord Sumner added:

"It is not that the law presumes such statements to be untrue but from the danger of receiving such evidence Judges have thought it better to reject it for the due administration of justice: *Reg* v. *Baldry*[4]. Accordingly when hope or fear were not in question, such statements were long regularly admitted as relevant, though with some reluctance, and subject to strong warnings as to their weight."

Even so, in the judgment referred to by Lord Sumner, Parke, B. bewailed that the rule had been carried too far out of "too much tenderness towards prisoners in this matter", and observed:

"I confess that I cannot look at the decisions without some shame, when I consider what objections have prevailed to prevent the reception of confessions in evidence. . . . . Justice and common sense have too frequently been sacrificed at the shrine of mercy."

Whatever the views of Parke B., Lord Sumner points out that "when Judges excluded such evidence, it was rather explained by their observations on the duties of policemen than justified by their reliance on rules of law.

Lord Sumner has then traced the history of the law in subsequent years. In 1905, Channel, J., in *Reg.* v. *Knight and Thayre*[5] referred to the position of an accused in custody thus:

"When he has taken any one into custody .... he ought not to question the prisoner........ I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the Judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

Five years later, the same learned Judge in *Rex* v. *Booth and Jones*[6], observed:

"The moment you have decided to charge him and practically got him into custody, then inasmuch as a Judge cannot ask a question or a Magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet, that if a policeman does ask a question it is admissible; what happens is that the Judge says it is not advisable to press the matter."

It is to be noticed that Lord Sumner noted the difference of approach to the question by different Judges, and observed that:

"Logically these objections all go to the weight and not to the admissibility of the evidence. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made the statement under circumstances of hope, fear, interest or otherwise strictly goes only to its weight. . . .Even the rule which excludes evidence of statements made by a prisoner, when they are induced by hope in authority, is a rule of policy".

The Judicial Committee did not express any opinion as to what the law should be. The state of English law in 1861 when these rules became a part of the

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1. L.R. (1914) A.C. 599.
2. L.R. (1893) 2 Q.B. 12.
3. (1783) 1 Leach C.C. 263; 168 E.R. 234.
4. (1825) 5 Cox. C.C. 523.
5. (1905) 20 Cox. C.C. 711.
6. (1910) 5 Cr. App. Rep. 177.

Indian law in a statutory form was thus that the police could question any person including a suspect. The statements of persons who turned out to be mere witnesses were entirely inadmissible, they being supposed to say what they could, on oath, in Court. Statements of suspects after caution were admissible but not before the caution was administered or they were taken in custody; but confessions were, as a rule, excluded if they were induced by hope, fear, threat, etc.

When the Indian law was enacted in 1861, it is common place that the statute was drafted in England. Two departures were made, and they were (1) that no statement made to a police officer by any person was provable at the trial which included the accused person, and (2) that no caution was to be given to a person making a statement.

In so far as the accused was concerned, he was protected from his own folly in confessing to a charge both after and before his custody unless he respectively did so in the immediate presence of a Magistrate, or his confession was recorded by a Magistrate. In either event, the confession had to be voluntary and free from taint of threat, promise, fear, etc. The law was framed to protect a suspect against too much garrulity before he knew that he was in danger which sense would dawn on him when arrested and yet left the door open to voluntary statements which might clear him if made but which might not be made if a caution was administered. Without the caution an innocent suspect is not in a position to know his danger, while a person arrested knows his position only too well. Without the caution, the line of distinction ceased, and the law very sensibly left out the statements altogether. Thus, before arrest all suspects, whether rightly suspected or wrongly, were on par. Neither the statements of the one nor of the other were provable, and there was no caution at all.

The English law then was taken as a model for accused in custody. Section 27 which is framed as an exception has rightly been held as an exception to sections 24-26 and not only to section 26. The words of the section were taken bodily from *Lockhart's case*,[1] where it was said:

> "But it should seem that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been thereby induced to say what is false ; but the fact discovered shews that so much of the confession as immediately relates to it is true."

That case followed immediately after *Warrickshall's case*,[2] and summarised the law laid down in the earlier case. The accused in that case had made a confession which was not receivable, as it was due to promise of favour. As a result of the confession, the goods stolen were found concealed in a mattress. It was contended that the evidence of the finding of the articles should not be admitted. Nares, J. with Mr. Baron Eyre observed:

> "It is a mistaken notion, that the evidence of confessions and facts which have been obtained from prisoners by promises or threats, is to be rejected from a regard to public faith ; no such rule ever prevailed. The idea is novel in theory, and would be as dangerous in practice as it is repugnant to the general principles of criminal law. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not intitled to credit. . . . .This principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession, or whether it arises from any other source ; for a fact, if it exists at all, must exist invariably in the same manner, whether the confession from which it is derived be in other respects true or false."

Another case is noted in the footnote in the English Report Series

> In February Session, 1784, Dorothy Mosey was tried....for shop lifting and a confession had been made by her and goods found in consequence of it, as the above case. Buller, J. (present Mr. Baron Perryn, who agreed) said:..............

1. (1785) 1 Leach. 386 ; 168 E.R. 295 and footnote to (1783) 1 Leach. C.C. 263.
2. (1783) 1 Leach. C.C. 263: 168 E.R. 234.

"A prisoner was tried before me (Buller, J.) where the evidence was just as it is here. I stopped all the witnesses when they came to the confession. The prisoner was acquitted. There were two learned Judges on the bench, who told me, that although what the prisoner said was not evidence, yet that any facts arising afterwards may be given in evidence, though they were done in consequence of the confession. This point, though it did not affect the prisoner at the bar, was stated to all the Judges ; and the line drawn was, that although confessions improperly obtained cannot be received in evidence, yet that the acts done afterwards may be given in evidence, though they were done in consequence of the confessions."

Where, however, no fact was discovered, the statement was not held admissible. See *Rex* v. *Richard Griffin*,[1] and *Rex* v. *Francis Jones*.[2]

In *Rex* v. *David Jenkins*,[3] the prisoner was convicted before Bayley, J. (present Park, J.) of stealing certain gowns and other articles. He was induced by a promise from the prosecutor to confess his guilt, and after that confession, he carried the officer to a particular house, but the property was not found. The evidence of the confession was not received; the evidence of his carrying the officer to the house as above-mentioned was. But Bayley, J. referred the point for consideration of the Judges. The Judges were of opinion that,

"the evidence was not admissible and the conviction was therefore wrong. The confession was excluded, being made under the influence of a promise it could not be relied upon, and the acts of the prisoner, under the same influence, not being confirmed by the finding of the property, were open to the same objection. The influence which might produce a groundless confession might also produce a groundless conduct."

It would appear from this that section 27 of the Indian Evidence Act has been taken bodily from the English law. In both the laws there is greater solicitude for a person who makes a statement at a stage when the danger in which he stands has not been brought home to him than for one who knows of the danger. In English law, the caution gives him the necessary warning, and in India the fact of his being in custody takes the place of caution which is not to be given. There is, thus, a clear distinction made between a person not accused of an offence nor in the custody of a police officer and one who is.

It remains to point out that in 1912 the Judges of the King's Bench Division framed rules for the guidance of the police. These rules, though they had no force of law, laid down the procedure to be followed. At first, four rules were framed, but later, five more were added. They are reproduced in Halsbury's Laws of England (3rd Edition), Vol. 10, page 470, para. 865. These rules also clearly divide persons suspected of crime into those who are in police custody and those who are not. It is assumed that a person in the former category knows his danger while the person in the latter may not. The law is tender towards the person who may not know of his danger, because in his case there is less chance of fairplay than in the case of one who has been warned.

It is to be noticed that in the Royal Commission on Police Powers and Procedure (1928-29) C.M.D. 3297, nothing is said to show that there is anything invidious in making statements leading to the discovery of a relevant fact admissible in evidence, when such statements are made by persons in custody. The suggestions and recommendations of the Commission are only designed to protect questioning of persons not yet taken in custody or taken in custody on a minor charge and the use of statements obtained in those circumstances.

The law has thus made a classification of accused persons into two: (1) those who have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to

1. (1809) 168 E.R. 732.
2. (1809) 168 E.R. 733.
3. (1809) 168 E.R. 914.

these two classes is different. In the case of persons belonging to the first category the law has ruled that their statements are not admissible, and in the case of the second category, only that portion of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says: "I pushed him down such and such mineshaft", and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft.

It is argued that there is denial of equal protection of the law, because if the statement were made before custody began, it would be inadmissible. Of course, the making of the statement as also the stage at which it is made, depends upon the person making it. The law is concerned in seeing fairplay, and this is achieved by insisting that an unguarded statement should not be receivable. The need for caution is there and this caution is very forcefully brought home to an accused, when he is accused of an offence and is in the custody of the police. There is thus a classification which is reasonable as well as intelligible, and it subserves a purpose recognised now for over two centuries. When such an old and time-worn rule is challenged by modern notions, the bases of the rule must be found. When this is done, as I have attempted to do, there is no doubt left that the rule is for advancement of justice with protection both to a suspect not yet arrested and to an accused in custody. There is ample protection to an accused, because only that portion of the statement is made admissible against him which has resulted in the discovery of a material fact otherwise unknown to the police. I do not, therefore, regard this as evidence of unequal treatment.

Before leaving the subject, I may point out that the recommendation of the Royal Commission was:

> "(xlviii) A rigid instruction should be issued to the Police that no questioning of a prisoner, or a 'person in custody' about any crime or offence with which he is, or may be charged, should be permitted. This does not exclude question to remove elementary and obvious ambiguities in voluntary statements, under no.(7) of the Judges' Rules but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial."

This is a matter for the legislature to consider.

In view of what I have said above and the reasons given by Shah, J., I agree that the appeal be allowed, as proposed by him.

ORDER.

BY THE COURT:

In accordance with the opinion of the majority the appeal is allowed. Section 27 of the Indian Evidence Act and section 162, sub-section (2) of the Code of Criminal Procedure in so far as "that section relates to section 27 of the Indian Evidence Act", are *intra vires* and do not offend Article 14 of the Constitution. The order of the High Court acquitting the respondent is also set aside and the order of the Court of Sessions convicting the accused (respondent) under section 302 of the Indian Penal Code and sentencing him to death is restored.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Sheodhyan Singh and others .. *Appellants**

v.

Musammat Sanichara Kuer and others .. *Respondents.*

Execution sale—Boundaries, area and khata number correctly given in final decree as well as sale certificate but number of the plot wrongly given as " 160 " instead of " 1060 "—Is mere misdescription—Boundaries and area should prevail.

The area, the khata number and the boundaries of one of the plots included in a sale were correctly set out in the final mortgage decree and the sale certificate but in writing the plot number one zero was missed and 1060 became 160. Also there was no plot bearing No. 160 in the khata number which however included No. 1060. In the circumstances,

Held : This is a case of misdescription only and the identity of the property sold is well established, namely, that it is plot No. 1060. The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned. The purchaser was entitled to plot No. 1060.

Appeal from the Judgment and Decree dated the 10th October, 1955, of the Patna High Court, in Appeal from Original Decree No. 483 of 1947.

L. K. Jha, Senior Advocate (*P. K. Chatterjee,* Advocate, with him), for Appellants.

A. V. Viswanatha Sastri, Senior Advocate (*R. C. Prasad,* Advocate, with him), for Respondents Nos. 1-7:

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal on a certificate granted by the Patna High Court. The respondents brought a suit with respect to ten plots of land and claimed a declaration that the property belonged to them and prayed for possession of the plots by ejectment of the defendants-appellants and for mesne profits. Besides the appellants, there was another set of defendants to the suit from whom the respondents purchased the property. The respondents' case was that the appellants had taken a loan from the other defendants on a mortgage bond on the basis of which those defendants instituted a suit in 1932. This suit was decreed against the appellants and thereafter the other defendants got the mortgaged property sold by auction in execution and purchased it themselves in 1936. Thereafter the other defendants entered into possession of the property, delivery of which was made to them by Court. The other defendants remained in possession of the property till they sold it to the respondents in 1943. Thereafter the respondents came into possession of the property. The appellants however began to create trouble from 1942. After the sale to the respondents, the appellants created further trouble which led to proceedings in a criminal Court under section 144 of the Code of Criminal Procedure and the appellants were forbidden from going to the property in dispute. Later on, the appellants were bound down under section 107 of the Code of Criminal Procedure to keep the peace. In 1945 there was a murder in connection with this property on account of which some of the appellants were tried by the Court of session but were acquitted. There were further troubles over the crop of these plots in 1945. Eventually after their acquittal by the Court of session, the appellants took possession of the property by forcibly dispossessing

* C.A. No. 497 of 1957. 4th May, 1961.

the respondents. Consequently the respondents filed the suit out of which this appeal has arisen in July, 1946.

The suit was resisted by the defendants on a large number of grounds with which we are however not concerned now. The only points urged before us by learned counsel for the appellants is with respect to three plots out of the ten which were the subject-matter of the suit. The trial Court accepted the case put forward on behalf of the respondents and decreed the suit for possession and ordered that mesne profits would be determined subsequently. There was then an appeal by the present appellants to the High Court. The High Court dismissed the appeal except as to one plot with respect to which the suit of the respondents was dismissed. As the decree was of variance the High Court granted a certificate; and that is how the present appeal has come up before us.

We have already pointed out that the learned counsel for the appellants has confined his arguments before us with respect only to three plots, namely, 1060, 427 and 1128, out of the ten plots which were in dispute in the Courts below. His contention is that in any case the Courts below were wrong in granting possession to the respondents with respect to these three plots. We propose therefore to deal with the contentions raised in respect of these three plots only.

Re. Plot No. 1060.—The contention on behalf of the appellants with respect to this plot is that it was neither included in the final decree for sale in favour of the respondents' predecessors-in-interest nor in the sale certificate. Therefore, it was not open to the Courts below to grant a decree in favour of the respondents with respect to this plot. The final decree contains ten plots. It gives the Tauzi Number, the Khasra Number, the Thana Number, the Survey Number, the area and the boundaries of each plot. Among the ten plots mentioned in the final decree, there is a plot No. 160, but no plot bearing No. 1060. In the sale certificate also the same ten plots are mentioned. The sale certificate contains the khata number, the plot number, the area and the boundaries of each plot. There also we find No. 160 but no No. 1060. The High Court has held that No. 160 in the final decree and in the sale certificate is a mistake for 1060. It has further held that this is a case of misdescription and not a case of disputed identity, for in this case the identity of the plot included in the final decree and sold through the sale certificate is not uncertain. It has pointed out that the khata number, the area and the boundaries that are given in the final decree and in the sale certificate correspond with the khata number, the area and the boundaries of plot No. 1060. It has also pointed out that in the writ of delivery of possession to the respondents' predecessors as well as in the sale deed in favour of the respondents the correct plot (namely, 1060) has been mentioned. Further the High Court has also pointed out that there is no plot bearing No. 160 in khata No. 97. Therefore, as the khata number, the area and the boundaries given in the final decree and in the sale certificate tally with No. 1060, the identity is clearly established and there has only been a misdescription of the plot in the final decree as well as in the sale certificate by the omission of one zero from the plot number.

In this connection, learned counsel for the appellants relies on *Rambhadra Naidu* v. *Kadiriyasami Naicker.*[1] In that case it was held that "certificates of sale are documents of title which ought not to be lightly regarded or loosely construed." It was further held that

1. (1921) L.R. 48 I.A. 155 : I.L.R. 44 Mad. 483.

"where upon a sale under a mortgage decree the purchaser has been given a sale certificate which plainly includes certain property and has been put into possession, it is not open to the Court in a subsequent suit by the mortgagor's representative to hold by reference back to the mortgage deed that the property in question was not sold under the decree."

The facts however in that case were very different from the facts in the present case. There what had happened was that mortgage included the pannai lands which belonged to the mortgagor and which were in his enjoyment. But at the date of the mortgage certain pannai lands were not in the enjoyment of the mortgagor. When however the sale proceedings were taken in execution the person who was in possession at the date of the mortgage of some of the pannai lands was dead and in the final decree as well as in the execution proceedings all pannai lands belonging to the mortgagor and in his enjoyment were ordered to be sold. The mortgagor objected that some of the pannai lands were outside the mortgage and were not liable to sale. This objection was disallowed and all the pannai lands were sold and were included in the sale certificate and possession thereof was delivered to the purchasers. In these circumstances the Privy Council held that it was not possible to go back to the mortgage deed to find out what had been sold. It was also held that no suit could lie in the circumstances in view of section 47 of the Code of Civil Procedure.

In the present appeal, the learned counsel for the respondents does not ask us to go beyond the sale certificate and the final decree for sale; his contention is that there is a mere misdescription of the plot number in the two documents and that the identity of the plot sold is clear from the circumstances which we have already set out above. He relies on *Thakur Barmha* v. *Jiban Ram Marwari*.[1] In that case what had happened was that the judgment-debtor owned a mahal in which ten annas share was mortgaged while the remainder was free from encumbrances. A creditor of his attached and put up for sale six annas share out of the mortgaged share. The property attached was sold. When the auction purchasers applied for the sale certificate they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the six annas share and that property should have been described as being six annas not mortgaged. This prayer of theirs was allowed by the executing Court and the appeal to the High Court failed. On appeal to the Privy Council, it was held that in a judicial sale only the property attached can be sold and that property is conclusively described in and by the schedule to which the attachment refers, namely, the six annas share subject to an existing mortgage. The Privy Council therefore allowed the appeal and observed that a case of misdescription could be treated as a mere irregularity; but the case before them was a case of identity and not of misdescription. It was pointed out that a property fully identified in the schedule may be in some respects misdescribed, which would be a different case. Thus the effect of this decision is that where there is no doubt as to the identity and there is only misdescription that could be treated as a mere irregularity. Another case on which reliance has been placed on behalf of the respondents is *Gossain Das Kundu* v. *Mrittunjoy Agnan Sardar*.[2] It that case the land sold was described by boundaries and area; but the area seems to have been incorrect. It was held to be a case of misdescription of the area and the boundaries were held to prevail.

We are of opinion that the present case is analogous to a case of misdescription. As already pointed out the area, the khata number and the boundaries all refer to plot No. 1060 and what has happened is that in writing the

1. (1913) 26 M.L.J. 89 : I.L.R. 41 Cal. 590 : L.R. 41 I.A. 38.

2. (1913) 18 C.L.J. 541.

plot number, one zero has been missed and 1060 has become 160. It is also important to remember that there is no plot bearing No. 160 in khata No. 97. In these circumstances we are of opinion that the High Court was right in holding that this is a case of misdescription only and that the identity of the property sold is well established, namely, that it is plot No. 1060. The matter may have been different if no boundaries had been given in the final decree for sale as well as in the sale certificate and only the plot number was mentioned. But where we have both the boundaries and the plot number and the circumstances are as in this case, the mistake in the plot number must be treated as a mere misdescription which does not affect the identity of the property sold. The contention of the appellants therefore with respect to this plot must fail.

Re. Plot No. 427.—This plot was originally mortgaged with two other plots in 1920 with the other defendants for Rs. 400. Later, the mortgagor usufructuarily mortgaged this plot with a number of others with Ramzan Mian and another in 1927 for Rs. 2,500. This mortgage deed does not show that any money was left with the mortgagees to redeem the plots mortgaged with the other defendants. But it appears that soon after the mortgage in favour of Ramzan Main, the mortgage in favour of the other defendants was redeemed by payment of the mortgage amount due to them through Nizam-ud-din and Shams-ud-din. It is said that this payment was made on behalf of Ramzan Mian and therefore Ramzan Mian and another were subrogated in place of the other defendants so far as this plot was concerned. Further it is urged that Ramzan Mian and another were not made parties to the suit of 1932 and that there is nothing to show that when the suit was brought for sale of the ten plots in 1932, the mortgage made in favour of Ramzan Mian and another in 1927 had been redeemed and therefore the purchasers in the execution proceedings in that suit could only get the property subject to the mortgage of Ramzan Mian and another and could not dispossess the appellants, if they were in possession through mortgagees Ramzan Mian and another. In reply, the learned counsel for the respondents contends that so far as the appellants are concerned, their right and title in this plot have completely gone and it is not for the appellants to claim any right of subrogation in respect of the mortgage which was redeemed by Ramzan Mian and another. Further it is urged that there is nothing to show on this record that in 1932 when the suit was brought the mortgage of Ramzan Mian and another was subsisting and that the appellants were in possession on behalf of Ramzan Mian and another. Therefore the appellants could not put forward any claim for possession of plot No. 427 and if Ramzan Mian and another had any claim they can look after their own interest, even if they were not made parties to the suit of 1932. The result would be that their rights in their mortgage would be subsisting and they can enforce them, if they can under the law, against the respondents; but the appellants cannot put forward their claim to defeat the respondents' case.

We are of opinion that there is no force in these contentions raised on behalf of the appellants. In the first place, it is difficult to understand how the appellants can raise the question of subrogation on behalf of Ramzan Mian and another. In the second place, Ramzan Mian and another could only be subrogated to the rights of the mortgagees of 1920 whose mortgage they had redeemed if there was an agreement in their mortgage that they would be so subrogated. We might have inferred such agreement if any money had been left with Ramzan Mian and another to redeem the earlier mortgage; but the mortgage deed of 1927 in their favour says nothing about the earlier mortgage at all. In these circumstances there can be no question of subrogation even

if it was open to the appellants to raise that point before us on behalf of Ramzan Mian and another.

As to the contention that Ramzan Mian and another were not made parties to the mortgage suit and therefore their rights are not affected and if the appellants held the land from Ramzan Mian and another they would still be entitled to possession and could not be dispossessed, it is enough to say that this argument could be raised if it were established that the mortgage of 1927 was still subsisting when the suit was bought in 1932. On that point however there is no evidence and we do not know whether the mortgage of Ramzan Mian and another was subsisting in 1932. Further the finding of the High Court is that whatever evidence is on the record shows that at any rate in 1935 the appellants were in possession of Plot No. 427. In these circumstances we cannot hold positively that the mortgage of Ramzan Mian and another was subsisting in 1932 when the suit was brought and that the appellants were in possession of this plot on behalf of Ramzan Mian and another. The appellants therefore cannot resist the claim of the respondents for possession on the ground that they are holding this plot on behalf of Ramzan Mian and another without any proof of this on the record. The appellants' contention therefore with respect to plot No. 427 must also fail.

Re. Plot No. 1128.—The case of the appellants with respect to this plot is similar to the case with reference to plot 427. In the circumstances the appellants' contention with respect to this plot must also fail. As no other point was urged before us, the whole appeal fails.

We therefore dismiss the appeal with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Original Jurisdiction).

PRESENT:—B. P. SINHA, *Chief Justice*, S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Ranchhoddas Atmaram .. *Petitioners**

v.

The Union of India and others .. *Respondents.*

Hamad Sultan .. *Intervener.*

AND

T. K. Gupta .. *Appellant*†

v.

The State of Bombay (now Maharashtra) and others .. *Respondents.*

Sea Customs Act (*VIII of* 1878), *section* 167 (8)—*Construction—Maximum penalty which can be imposed —If limited to Rs.* 1,000.

Under Item (8) in section 167 of the Sea Customs Act a penalty in excess of Rs. 1,000 can be imposed. It is a purely affirmative provision laying down two alternative penalties to choose from with a maximum for each (not exceeding three times the value of the goods or not exceeding one thousand rupees.

(Petition under Article 32 of the Constitution of India for enforcement of Fundamental Rights) and

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* Petition No. 300 of 1960.

†Crl. A. No. 107 of 1958.

3rd February, 1961

Criminal Appeal by Special Leave from the Judgment and Order dated the 5th April, 1957, of the Bombay High Court in Criminal Revision Application No. 1100 of 1956.

Porus A. Mehta and *S. J. Sorabjee*, Advocates and *S. N. Andley, J. B. Dadachanji, Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, for Petitioners.

C. K. Daphtary, Solicitor-General of India (*H. R. Khanna, Y. S. Parmar* and *D. Gupta*, Advocates, with him), for Respondents (In Petition No. 300 of 1960).

Porus A. Mehta and *S. J. Sorabjee*, Advocates and *J. B. Gagrat* and *G. Gopalakrishnan*, Advocates of *M/s. Gagrat & Co.*, for Intervener.

N. C. Chatterjee, Senior Advocate (*R. L. Aggarwal*, Advocate, with him), for Appellant. (In Criminal Appeal No. 107 of 1958).

H. R. Khanna and *R. H. Dhebar*, Advocates, for Respondents (In Criminal Appeal No. 107 o 1958).

The Judgment of the Court was delivered by

Sarkar, J.—These two matters have been heard together as they raise a common question. One of these matters is a petition under Article 32 of the Constitution and the other, an appeal from a judgment of the High Court at Bombay.

The petitioner and the appellant were found by the Customs authorities, in proceedings under the Sea Customs Act, 1878, to have imported goods in breach of section 19 of that Act. The petitioner had without authority imported gold of the value of Rs. 25,000 and the appellant, steel pipes of the value of Rs. 1,28,182. The Customs authorities by independent orders, imposed a penalty of Rs. 5,000 on the petitioner and of Rs. 25,630 on the appellant for these offences, under item 8 of the schedule to section 167 of the Act. The Customs authorities further confiscated the petitioner's gold under the same provision. There was no order of confiscation of the steel pipes for reasons to which it is unnecessary to refer.

The appeal is against an order the result of which was to direct realisation of the penalty imposed on the appellant, by execution of a distress warrant. The petition challenges the validity of the order imposing the pecuniary penalty. Neither the petitioner nor the appellant, however, questions the decisions of the Customs authorities that they had been guilty of breach of section 19 or that penalties could be imposed on them under item 8 in section 167. The petitioner does not, further, challenge the order confiscating the gold.

The only contention of the petitioner and the appellant is that the orders of the Customs authorities are invalid as they impose penalties in excess of Rs. 1,000. They contend that the maximum penalty that can be imposed under item 8 in section 167 is Rs. 1,000. This contention is based on two grounds. First it is said that, it has been so held by this Court. Then it is said that, in any case, on a proper construction item 8 in section 167 does not permit the imposition of a penalty in excess of Rs. 1,000.

First, as to the decisions of this Court, we were referred to three. The earliest is *Maqbool Hussain* v. *The State of Bombay*.[1] That was a case in which the question was whether a person on whom a penalty of confiscation of goods had been imposed under item 8 in section 167, could later be prosecuted on the

1. (1953) 2 M.L.J. 113 : (1953) S.C.J. 456 : 1953 S.C.R. 730.

same facts for an offence under section 23 of the Foreign Exchange Regulation Act, 1947, in view of the provisions of Article 20 (2) of the Constitution against, what has been called, double jeopardy. It was held that Article 20 (2) was no bar to the prosecution under the Foreign Exchange Regulation Act, for, the authority under the Sea Customs Act imposing the penalty under item 8 in section 167 was not a judicial tribunal and the proceeding resulting in the imposition of the penalty of confiscation was, therefore, not a prosecution. No question arose in that case as to the maximum penalty that could be imposed under item 8 in section 167. While discussing whether a Customs authority exercising the power to order confiscation and levy a penalty under section 167 formed a judicial Tribunal, this Court observed at page 742,

" Even though the customs officers are invested with the power of adjudging confiscation, increased rates of duty or penalty the highest penalty which can be inflicted is Rs. 1,000 ".

It is quite obvious that this observation was made in a different context and was not intended to decide that the provision did not permit the imposition of a higher penalty, as to which no question had then arisen. It is clear that if the highest penalty which the Customs officers had the power to impose was in excess of Rs. 1,000 but subject to another limit, it would not have followed that they were judicial Tribunals. The judgment of this Court was not based on the amount of the maximum penalty which the Customs authorities could impose. It seems rather to have been assumed that the maximum penalty was Rs. 1,000 for the question about maximum penalty was neither argued, nor discussed in the judgment at all.

The second case is *Babulal Amthalal Mehta* v. *The Collector of Customs.*[1] The only question that arose there was whether section 178-A of the Sea Customs Act, which placed on the person from whose possession any goods mentioned in the section and reasonably believed to have been smuggled were seized, the burden of proving that they were not so, was void as offending Article 14 of the Constitution. In discussing the scheme of the Act, it was observed in connection with item 8 in section 167 that

" This Court has held that the minimum is the alternative : See *Maqbool Hussain* v. *The State of Bombay*[2] ".

Here again, it is clear that the Court was not deciding the question that has now arisen before us. It only made a passing reference to the observation in *Maqbool Hussain's case.*[2] It was not necessary for the decision of *Babulal's case*[1] to have pronounced on the correctness of the observation in *Maqbool Hussain's case,*[2] and no such pronouncement was clearly intended. Nor was it necessary in *Babulal's case,*[1] to express any view as to the maximum penalty that could be imposed under item 8 in section 167.

The last case referred to is *F. N. Roy* v. *The Collector of Customs, Calcutta.*[3] That was a case where an order had been made under item 8 in section 167 confiscating certain goods imported without authority and imposing a penalty of Rs. 1,000 in respect of that import. The importer filed a petition in this Court under Article 32 of the Constitution challenging the validity of the penalties levied. The main part of the argument of the learned counsel for the petitioner was based on the Imports and Exports (Control) Act, 1947, and raised questions which do not concern us in the present cases. It appears however that it was also contended that item 8 in section 167 offended Article 14 of the Constitution, a point which again does not arise in the cases in hand. That contention was dealt with in the following words at page 1158,

1. (1957) M.L.J. (Crl.) 765 : (1957) S.C.J. 828 : 1957 S.C.R. 1110, 1116.
2. (1953) S.C.J. 456: (1953) 2 M.L.J. 113: (1953) S.C.R. 730.
3. (1957) M.L.J. (Crl.) 684: (1957) S.C.J. 734: 1957 S.C.R. 1151.

"Another similar argument was that section 167, item 8 of the Sea Customs Act itself offended Article 14 in that it left to the uncontrolled discretion of the Customs authorities to decide the amount of the penalty to be imposed. The section makes it clear that the maximum penalty that might be imposed under it is Rs. 1,000. The discretion that the section gives must be exercised within the limit so fixed. This is not an uncontrolled or unreasonable discretion. Furthermore, the discretion is vested in high Customs officers and there are appeals from their orders. The imposition of the fine is really a quasi-judicial act and the test of the quantum of it is in the gravity of the offence. The object of the Act is to prevent unauthorised importation of goods and the discretion has to be exercised with that object in view."

It will be observed that the fine imposed was Rs. 1,000. It was not therefore a case in which any question could arise as to whether a penalty in excess of Rs. 1,000 could be imposed and in fact no such question arose. The question that arose was, whether the section offended Article 14, so that, no penalty could be imposed under it at all. It was in this connection that it was observed that item 8 in section 167 did not leave it to the uncontrolled discretion of the Customs authorities to decide the amount of the penalty, because it had imposed a limit on that amount. It is true that the limit was there mentioned as Rs. 1,000. But it it clear that the reasoning would have held equally if it had been said that the limit imposed was either three times the value of the goods or Rs. 1,000. The point that was sought to be made in the judgment was that there was a limit and that, that was a reason for saying that the discretion given was not uncontrolled and, therefore, there was no violation of Article 14. For this purpose, it made no difference what the limit was.

Some of the High Courts have thought that this Court had decided in these cases that the maximum penalty permissible under the provision is Rs. 1,000. The fact is that the question was never required to be decided in any of these cases and could not, therefore, have been, or be treated as, decided by this Court. In *Leo Roy Frey* v. *The Superintendent, District Jail, Amritsar,*[1] this Court observed that,

"No question has been raised as to the maximum amount of penalty that can be imposed under section 167 (8) and we are not called upon to express any opinion on that point."

This would show that this Court had taken notice of the fact that the High Courts were interpreting the judgment in *F. N. Roy's case,*[2] and the other cases in a manner which was not intended and desired to strike a note of warning against the misconception. None of these cases is authority for the proposition that the maximum penalty which can be imposed under item 8 in section 167, is Rs. 1,000. The argument that this Court has already held that the maximum penalty that can be awarded under it is Rs. 1,000 must therefore fail.

We now come to the construction of the provision, the relevant portion of which is in these terms:

Section 167.—The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively :

Offences	Sections of this Act to which offence has reference	Penalties
....		
....	....	....
	....	....
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction.		Such goods shall be liable to confiscation ; and any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.
....	....	....

1. (1958) M.L.J. (Crl.) 289 : (1958) S.C.J. 301 : 1958 S.C.R. 822, 827.

2. (1957) 2 M.L.J. (Crl.) 684; (1957) S.C.J. 734 (1957) S.C.R. 1151.

The words which are material to this case are,

"Any person concerned in any such offence shall be liable to a pentaly not exceeding three times the value of the goods or not exceeding one thousand rupees."

The question is whether, in imposing a penalty, the conditions laid down in both the alternative clauses joined by the word "or" have to be fulfilled or the condition in any one of them only?

It is clear that if the words form an affirmative sentence, then the condition of one of the clauses only need be fulfilled. In such a case "or" really means "either" "or". In the Shorter Oxford Dictionary one of the meanings of the word "or" is gives as "A particle co-ordinating two (or more) words, phrases or clauses between which there is an alternative". It is also there stated, "The alternative expressed by "or" is emphasised by prefixing the first member or adding after the last, the associated adverb *Either*." So, even without "either", "or" alone creates an alternative. If, therefore, the sentence before us is an affirmative one, then we get two alternatives, any one of which may be chosen without the other being considered at all. In such a case it must be held that a penalty exceeding Rs. 1,000 can be imposed.

If, however, the sentence is a negative one then the position becomes different. The word "or" between the two clauses would then spread the negative influence over the clause following it. This rule of grammar is not in dispute. In such a case the conditions of both the clauses must be fulfilled and the result would be that the penalty that can be imposed can never exceed Rs. 1,000.

The question then really comes to this: Is the sentence before us a negative or an affirmative one? It seems to us that the sentence is an affirmative sentence. The substance of the sentence is that a certain person shall be liable to a penalty. That is a positive concept. The sentence is therefore not negative in its import.

The learned counsel for the petitioner and the appellant said that the sentence began with a negative, namely, the words "not exceeding" and therefore it is a negative sentence and the word "or" occurring later in the sentence must spread the negative influence over that part of the sentence which follows it. This contention is clearly fallacious. The word ,'not" refers only to the word "exceeding" following it and the two together constitute a qualifying clause limiting the amount of the penalty that can be imposed. There is no negative sense to spread over and influence the rest of the sentence. If the learned counsel were right, the words "not exceeding" would not have been repeated after the word "or" for the word "or" would have carried the negative influence forward and another negative would not have been necessary. The acceptance of learned counsel's argument that "or" carried any negative influence forward, would make nonsense of the sentence.

It seems to us that the learned counsel really wants us to read the section as if the words were, "shall *not* be liable to a penalty exceeding three times the value of the goods, or exceeding one thousand rupees". So read the sentence would be a negative one and the word "or" would carry the negative influence forward. To do that would, however, be re-enacting and not interpreting. It is clear that each time the expression "not exceeding" is used, it qualifies the extent of the punishment that is stated after it. That expression is really equivalent to the words "up to" and can be easily substituted by them without affecting the sentence in any way. There is really no negative in the sentence and what we have, is a purely affirmative provision laying down two alternative penalties to choose from, with a maximum for each.

The distinction between affirmative and negative sentences may be illustrated by the case of *The Metropolitan Board of Works* v. *Steed.*[1] The provision there considered was,

"No existing road, being of less width than forty feet shall be........formed........as a street for the purposes of carriage traffic, unless such road be widened to the full width of forty feet........ or for the purposes of foot traffic only, unless such road............be widened to the full width of twenty feet *or* unless such streets respectively shall be open at both ends."

It was held that both the conditions had to be fulfilled and the street had to be of the prescribed width and also open at both ends. One of the reasons given for this view was that the sentence was a negative one and the word "or" (being the one *italicised* by us) in it carried forward the negative influence and made it necessary to fulfill both the conditions. It was said at pages 447-48,

"We might have referred to authorities by good writers,s shewing that where the word "or" is preceded by a negative or prohibitory provision, it frequently has a different sense from that which it has when it is preceded by an affirmative provision. For instance, suppose an order that "you must have your house either drained or ventilated." The word "or" woud be clearly used in the alternative. Suppose again, the order was that "you must have your house drained or ventilated", that conveys the idea to my mind that you must have your house either drained or ventilated. But supposing the order were that "you must not have your house undrained or unventilated". The second negative words are coupled by the word "or", and the negative in the preceding sentence governs both. In section 98 there is a negative preceding a sentence; "no existing road" shall be formed".

It is obvious that the sentence before us contains no negative or prohibitory provision. It only contains a positive provision empowering one of the two alternative penalties laid down to be imposed. The fact that the penalties are directed *not* to exceed a certain limit does not change the sentence from affirmative to negative; the sentence remains permissive and does not become prohibitory. It follows that any of the alternative penalties provided may be imposed though the amount of it exceeds the amount of the maximum in the other alternative. A consideration of the object of the Act also supports that view. The Act is vital for the country's economic stability. It is intended to prevent smuggling in goods and such goods as may be of large value. A small fine of Rs. 1,000 would often be quite inadequate to serve these objects. It would be in consonance with such objects if power is given to the authorities concerned to impose a higher penalty when the occasion requires it.

The learned counsel for the petitioner and the appellant then referred us to Websters New International Dictionary (2nd Edition) where one of the meanings of the word "nor" has been given as "or not". The learned counsel say that the word "or" and the word "not" following it have to be read together and on the authority of Webster, ask us to substitute for them the word "nor" in order to get at the intention of the Legislature. But we do not have here the word "nor". Nor are we able to find anything in Websters Dictionary authorising the substitution of "nor" in all places for the words "or not". We are clear that here no "or not" occurs which can be substituted by "nor" without doing violence to the sentence. The word "not", following the word "or", is really joined to and qualifies the word "exceeding" which comes after it and cannot be joined to the preceding word "or" at all. To read the words "or not" as joined to each other, and to substitute them by "nor" would be to change the structure of the whole sentence and, therefore, its meaning. An interpretation which so radically alters the meaning of the clause, cannot be accepted.

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1. (1881-82) L.R. 8 Q.B.D. 445.

These were the main arguments advanced by the learned counsel for the petitioner and the appellant. There remain, however, certain other points raised by them to deal with. It was said that the fact that two alternative penalties had been provided would indicate that one of them was the maximum. It is somewhat difficult to comprehend this argument. By itself it does not show that the maximum penalty would be Rs. 1,000 and that is what the learned counsel want us to hold. We have earlier held that either of the two penalties provided may be chosen by the authorities concerned as they consider fit. Suppose three times the value of the goods with which the offence is concerned, exceeds Rs. 1,000. Then that would be the larger of the two penalties that can be awarded in that case and the present argument does not establish that this larger penalty cannot be imposed. Which is the maximum in a particular case, would depend on the value of the goods. Further, there seems to us to be good reason why two alternative penalties were provided. Where the value of the goods is very large, it may be that a penalty of Rs. 1,000 would be too inadequate a punishment. Again, it may be that three times the value of the goods may be much smaller than Rs. 1,000. It may conceivably be necessary in such a case by reason, for example, of the person concerned having on earlier occasions committed the same offence or having shown a determined state of mind to commit the offence, to inflict a penalty higher than three times that value. Then it may also happen that the value of the thing concerned may, in conceivable circumstances, not be properly ascertainable. In such a case the alternative penalty up to Rs. 1,000 has to be adopted if any penalty at all is to be awarded.

The learned counsel then said that if both the alternatives were available to the authorities concerned to choose from, then the provision would give them a very arbitrary discretion which, whether it offended Artice 14 or not, there is no reason to think was intended by the Legislature. We do not think that this argument is of force. Each of the alternative penalties provided, has a limit attached to it. Therefore the discretion is neither unlimited nor arbitrary. It may be that three times the value may amount to an enormous sum but that will be so only when the value of the goods with which the offence is concerned, is high. If goods of high value are the subject-matter of the offence, then there is no reason for saying that the provision for imposing a penalty of three times that value, is not intended by the Legislature.

Another argument advanced on behalf of the petitioner and the appellant was that no other item in section 167 provided for a penalty in money, as distinguished from confiscation, in excess of Rs. 1,000 and this indicated the intention of the Legislature not to impose a higher penalty. It was therefore said that item 8 should be construed in accordance with this intention as not enabling the imposition of a pecuniary penalty higher than Rs. 1,000. The first answer to this contention is that the intention in item 8 has to be gathered from the language used in it. If that language is clear, that must be given effect to whatever may have been the intention in other provisions. In our view, the language in item 8 is clear and it permits the imposition of a penalty in excess of Rs. 1,000. No question of gathering the intention of the Legislature from the other items arises. The second answer is that the learned counsel are not right when they say that the other items do not provide for a pecuniary penalty in excess of Rs. 1,000. Thus under item 29 when goods are found in a boat without a boat-note as required by section 76 of the Act, the person in charge of the boat shall be liable to a penalty not exceeding twice the amount of the duty leviable on the goods. Now it is conceivable that such duty may be in excess of Rs. 1,000. Provisions for similar penalty will be found in items 17, 29, 31, 38, 48 and others. There are also several items which permit the imposition of a penalty calculated at

large sums like Rs. 500 and Rs. 1,000 per package. In these the amount of the penalty might easily exceed Rs. 1,000: *see* items 17, 36, 49, 56. There is another group of items which permits the imposition of penalty calculated on the value of the goods, and such penalty may, of course, be far in excess of Rs. 1,000: *see* items 58, 59 and 73. It would indeed be strange if a statute like the Sea Customs Act, on the proper working of which the finance and commerce of the country largely depend, considered a pecuniary penalty of Rs. 1,000 enough for a breach of any of its provisions. We feel no doubt that the Act did not intend this.

It was also argued that a penal statute like the one before us, must be construed in favour of a citizen and therefore item 8 should be construed as permitting the imposition of a penalty up to Rs. 1,000 and no more. This rule of construction of a penal statute is applicable only where the meaning of the statute is not clear. This is not the case with the present statute. The appellant and the petitioner can therefore derive no assistance from this rule.

The learned counsel for the petitioner and the appellant also said that the Sea Customs Act was modelled on 39 and 40 Vict., chapter 36, an English statute to consolidate the Customs laws, section 186 of which corresponds to section 167 of our Act. They said that the English section expressly provided that the authority concerned would have the option to choose any of the punishments specified but our statute deliberately departed from this and did not use the words "at the election of" which occur in the English statute. In our view, even without these words the meaning in our provision is plain. It also seems to us that the English statute used the words "at the election of" by way of abundant caution. The effect of that statute would have been the same even without those words. It may be that in our statute similar words were not used because it is somewhat differently framed; the use of them may have been considered inappropriate. The English statute gives a choice between two fixed penalties of "treble the value of the goods" and "one hundred pounds". In our statute, each of the two alternative penalties is flexible; each penalty is not to exceed a certain limit.

The last argument was based on the word "extent appearing in the main part of section 167 which, it is said, indicated that the third column laid down the extent of the punishment that could be awarded. This argument does not carry the matter further at all for, whichever of the two competing interpretations is accepted, in each case there would be the extent of the punishment specified and that word cannot help in deciding what the correct interpretation is.

For these reasons it seems to us that under item 8 in section 167 a penalty in excess of Rs. 1,000 can be imposed and so the orders that the Customs authorities had made in these cases are not open to any challenge. It is not in dispute that the penalties imposed did not exceed three times the value of the goods concerned.

The petition and the appeal are accordingly dismissed. There will be no order for costs.

Petition and appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—S. K. DAS, M. HIDAYATULLAH, AND J. C. SHAH, JJ.

Charu Chandra Kundu .. *Appellant**

v.

Gurupada Ghosh .. *Repondent.*

Income-tax Act (XI of 1922), section 54—Scope—Prohibition against disclosure of information given to public servant in the course of income-tax proceedings—Assessee waiving the protection and privilege—Does not empower a Court in a civil suit to require the Income-tax Officer to produce depositions made before him.

Disclosure of information given to public servants in the course of income-tax proceedings has by a comprehensive provision (section 54, Income-tax Act) been prohibited. The Income-tax authorities are directed by the provision to treat the information disclosed, evidence given, and documents produced as confidential; the Courts are prohibited from requiring any public servant to produce the documents or the records and even to give evidence in respect thereof, and the public servants disclosing the particulars of the evidence, documents or records are penalised. Only statements of the nature described in sub-section (3) of section 54 of the Income-tax Act are exempt from the operation of sub-sections (1) and (2) thereof. The prohibition imposed against the Court by section 54 is absolute; its operation is not obliterated by any waiver by the assessee in whose assessment the evidence is tendered, document produced or record prepared.

Appeal by Special Leave from the Judgment and Order, dated the 28th May, 1956, of the Calcutta High Court, in Civil Rule No. 3317 of 1955.

N. C. Chatterjee, Senior Advocate (*A. K. Dutta* and *P. K. Chatterjee*, Advocates with him), for Appellant.

The Judgment of the Court was delivered by,

Shah, J.—Gurupada Ghosh respondent to this appeal filed suit No. 41 of 1953 in the 6th Court of the Subordinate Judge at Alipore District, 24 Parganas, West Bengal, for a money decree against the appellant—Charu Chandra Kundu —for Rs. 32,132-12-3 claiming that he had advanced to the appellant on May 11, 1949, "by way of temporary accommodation loan" Rs. 30,000 by a cheque drawn upon the Comilla Union Bank, Calcutta, and that the appellant had in two instalments re-paid Rs. 5,500 out of the amount advanced and the balance of Rs. 24,500 with interest remained due and payable by the appellant. The appellant pleaded by his written statement that a loan of Rs. 30,000 was advanced by the respondent to him and his wife Chapalabala and a promissory note was in consideration thereof executed by the borrowers in favour of the respondent and as collateral security for the loan, title deeds of certain immovable properties belonging to the said Chapalabala were deposited with the respondent and that thereafter between September 7, 1949 and April 13, 1953 the appellant had repaid an aggregate amount of Rs. 37,000 and the respondent having relinquished a sum of Rs. 235-7-0 on account of interest on such repayment the debt was discharged and in acknowledgment thereof, the promissory note and the title deeds of the immovable properties lodged with the respondent were returned. The appellant also raised other pleas which are not material for the purposes of this appeal. On the pleadings the burden of proving re-payment lay upon the appellant.

The appellant applied to the Subordinate Judge for the issue of a summons to the Commissioner of Income-tax directing that officer to arrange to produce "through a competent officer the original file and depositions given by the respondent" before the Income-tax Officer I (2) Division in the assessment of Charu Chandra Kundu." The Commissioner of Income-tax informed the Court that having regard to the prohibitions imposed by section 54 of the Income-tax Act, he was unable to produce any of the statements, returns, accounts, docu-

* C.A. No. 206 of 1959. 5th May, 1961.

ments or records of assesment proceedings under the Income-tax Act or to give evidence in support thereof. The appellant then applied that the objection of the Commissioner of Income-tax be over-ruled and that the Income-tax Officer or any other competent officer be directed to produce the statement made by the respondent and recorded on February 22, 1950, in the proceedings for assessment of the income of the appellant. In that petition, by paragraph 10, the appellant submitted that "on a true construction of section 54 of the Indian Income-tax Act, the exemption from disclosure and production relate only to the evidence or deposition, etc., made by an assessee himself and not to depositions or evidence of other witnesses. In any event, the disclosure and production, etc., prohibited by section 54 of the Income-tax Act being in the interest of the assessee only, the assessee himself can waive this special protection and privilege" and that the appellant waived his right to the protection and privilege" and that the appellant waived his right to the protection and privilege under section 54 of the Income-tax Act.

It was the case of the appellant that in certain proceedings relating to assessment of income-tax of the appellant for the year 1949-50, the respondent had on February 22, 1950, made a statement before the Income-tax Officer, and to support his defence in the suit he desired that the statement be produced before the Court. The trial Court upheld the objection raised by the Commissioner of Income-tax that in view section 54, he could not be required to produce the statement he was summoned to produce, and the High Court of Judicature at Calcutta in exercise of its jurisdiction under section 115 of the Code of Civil Procedure confirmed that view.

Section 54 of the Income-tax Act by the first sub-section declares all particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of the Income-tax Act or any evidence given, or affidavit or deposition made, in the course of any proceedings of any assessment proceeding under Chapter VIII, or in any record of any assessment proceedings or any proceeding relating to the recovery of a demand prepared for the purposes of the Act, shall be treated as confidential. The sub-section then proceeds to state that notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall save as provided in the Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record or to give evidence before it in respect thereof. By sub-section (2), a public servant disclosing any particular contained in any such document, return, accounts, documents, evidence, affidavit, deposition or record, is liable to be punished with imprisonment which may extend to six months and also with fine. These provisions however do not apply to certain documents specified in clauses (*a*) to (*p*) of sub-section (3).

It is manifest that disclosure of information given to public servants in the course of income-tax proceedings has by a comprehensive provision been prohibited. The Income-tax Authorities are directed by the provision to treat the information disclosed, evidence given, and documents produced as confidential: the Courts are prohibited from requiring any public servant to produce the documents or the records and even to give evidence in respect thereof, and the public servants disclosing the particulars of the evidence, documents or record are penalised. The statement alleged to be made by the respondent in the assessment proceedings is not of the nature described in sub-section (3) of section 54, and is therefore not exempt from the operation of sub-sections (1) and (2). There being an express interdict against the Court requiring production of the document, the Subordinate Judge was right in declining to accede to the request of the appellant.

Mr. Chatterjee appearing on behalf of the appellant contends that section 54 is enacted only for the protection of the assessee, and if the assessee waives the privilege enacted for his protection, the prohibition contained therein will be inoperative. But there is no such exception, express or implied, in the language used by the legislature. The prohibition imposed against the Court by section 54 is absolute: its operation is not obliterated by any waiver by the assessee in whose assessment the evidence is tendered, document produced or record prepared.

Mr. Chatterjee relied upon *Buchibai* v. *Nagpur University*,[1] in support of his contention that an assessee is entitled to waive the privilege which confers protection upon him by section 54. In that case, however, the only question which fell to be determined was whether certified copies of statements recorded or orders passed by the Income-tax authorities were admissible in evidence under section 65 of the Evidence Act to prove the contents of those documents. The Court in that case observed:

"The direction that such document (documents described in section 54) shall be treated as confidential is a direction to officials of the Income-tax Department, and in our opinion it is open to an assessee to waive that right and to give evidence, if he desires, or particulars contained in such a record, as was held in *Rama Rao* v. *Venkataramayya*[2]. There is nothing in section 54 which prohibits the giving of such evidence ; the section merely directs officials of the Income-tax Department to treat such documents as confidential and prohibits the Court from requiring public servants to produce such documents or to give evidence about such documents."

But the question whether a certified copy of the statement made by the respondent before the Income-tax Officer is admissible does not fall to be determined in this appeal. The Subordinate Judge expressly recorded in the proceeding dated November 18, 1955 that he did

"not mean to say that certified copy of the document will not be admissible in evidence at the time of the trial of the suit if the said certified copy is otherwise found to be admissible in evidence."

Buchibai's case,[1] is a decision about the admissibility of a certified copy of the statement made by one Laxminarayan to the Assistant Commissioner of Income-tax: it did not decide that the Court could require production by summons of the original statements from the records of the Assistant Commissioner.

A similar view as to admissibility of certified copies of statements made before the Income-tax authorities was also expressed in *Rama Rao* v. *Venkataramayya*,[2] *Suraj Narain* v. *Seth Jhabhu Lal and others*[3] and *Banarsi Devi* v. *Janki Devi*.[4] We may observe that we are not called upon to express any opinion on the correctness or otherwise of these decisions. Suffice it to say that they have no application to the question to be determined in this appeal.

The appeal fails and is dismissed.

Appeal dismissed.

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1. (1947) 15 I.T.R. 150.
2. (1940) 2 M.L.J. 257 : I.L.R. (1940) Mad. 969 : (1940) 8 I.T.R. 450.
3. (1945) 13 I.T.R. 13.
4. A.I.R. 1959 Pat. 172.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction).

PRESENT:—P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

Ramlal, Motilal and Chhotelal .. *Appellants**

v.

Rewa Coalfields Ltd. .. *Respondent.*

Limitation Act (IX of 1908), section 5—Construction—" Within such period "—Meaning.

It would be immaterial and even irrelevant to invoke general considerations of diligence of parties in construing the words of section 5 of the Limitation Act. The context seems to suggest that " within such period " means within the period which ends with the last day of limitation prescribed. In all cases falling under section 5 what the party has to show is why he did not file an appeal on the last day of limitation prescribed. That may inevitably mean that the party will have to show sufficient cause not only for not filing the appeal on the last day but to explain the delay made thereafter day by day. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. Considerations which have been expressly made material and relevant by the provisions of section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under section 5 without reference to section 14 of the Limitation Act.

Majority decision in *Karalicharan Sarma* v. *Apurbakrishna Bajpeyi,* (1931) I.L.R. 58 Cal. 549, approved.

Kedarnath v. *Zumberlal,* A.I.R. 1916 Nag. 39 and *Jahar Mal* v. *Pritchard,* A.I.R. 1919 Pat. 503, overruled.

Ram Narain Joshi v. *Parameswar Narain Mahta,* (1902-1903) L.R. 30 I.A. 20 : I.L.R. 30 Cal. 309 and *Brij Inder Singh* v. *Kanshi Ram,* (1916-17) 33 M.L.J. 485 : L.R. 44 I.A. 218 : I.L.R. 45 Cal. 94 (P.C.), distinguished.

Appeal from the Judgment and Decree, dated the 6th August, 1955, of the Judicial Commissioner's Court, at Rewa, V.P. in First Civil Appeal No. 16 of 1955.

S. N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of *Messrs. Rajinder Narain and Co.,* for Appellants.

D. N. Pathak, R. Mahalingier and B. C. Misra, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question which falls to be considered in this appeal relates to the construction of section 5 of the Indian Limitation Act (IX of 1908). It arises in this way. The respondent Rewa Coalfields Limited is a registered company whose coal-mines are situated at Burhar and Umaria. Its registered office is at Calcutta. The appellant is a firm, Chaurasia Limestone Company, Satna, Vindhya Pradesh, by name and the three brothers Ramlal, Motilal and Chhotelal are its partners. The appellant prepares and deals in limestone at Mihar and Satna and for the use in their lime-kilns it purchased coal from the respondent's coal-mines at Umaria by means of permits issued to it by Coal Commissioner, Calcutta. According to respondent's case the appellant purchased from it 3,307 tons of coal at the rate of Rs. 14-9-0 per ton between January 1952, and March 1953. The price for this coal was Rs. 48,158-4-0. Since the appellant did not pay the price due from it the respondent filed the present suit in the Court of the District Judge, Umaria, and claimed a decree for Rs. 52,514-14-0 including interest accrued due on the amount until the date of the suit.

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*C. A. No. 276 of 1958. 4th May, 1961.

A substantial part of the respondent's claim was disputed by the appellant. It was urged by the appellant in its written statement that the amount claimed by the respondent had been arbitrarily calculated and that for a substantial part of the coal purchased by the appellant from the respondent due price had been paid. The appellant pleaded that for some time past it had stopped purchasing coal from the respondent and it was obtaining its supplies from Messrs. Sood Brothers, Calcutta, to whom payments for the coal supply had been duly made. The appellant admitted its liability to pay Rs. 7,496-11-0 and it expressed its readiness and willingness to pay the said amount.

On these pleadings the learned trial Judge framed seven issues. It appears that on the date when the respondent led its evidence and the appellants turn to lead its evidence arrived an application for adjournment was made on its behalf to produce additional evidence which was granted on condition that the appellant should pay to the respondent Rs. 200 as costs. On the subsequent date of hearing, however, the appellant did not appear nor did it pay costs to the respondent as ordered. That is why the trial Court proceeded *ex parte* against the appellant. On the issues framed trial Court made findings in favour of the respondent in the light of the evidence adduced by the respondent and an *ex parte* decree was passed against the appellant to the tune of Rs. 52,535-7-0 with proportionate costs. The appellant was also ordered to pay interest at 6 per cent. per annum from October 6, 1953, which was the date of the suit until the date of payment. This decree was passed on November 9, 1954.

Against this decree the appellant preferred an appeal in the Court of the Judicial Commissioner, Vindhya Pradesh, Rewa, on February 17, 1955 (Appeal No. 16 of 1955). The main contention raised by the appellant in this appeal was that the *ex parte* decree should be set aside and the case remanded to the trial Court with the direction that the appellant should be allowed to lead its evidence and the case disposed of in accordance with law in the light of the said evidence. On February 19, 1955, the appellant filed an application under section 5 of the Limitation Act and prayed that one day's delay committed by it in filing the appeal should be condoned because Ramlal, one of the partners of the appellant's firm, who was in charge of the litigation, fell ill on February 16, 1955, which was the last date for filing the appeal. This application was supported by an affidavit and a medical certificate showing that Ramlal was ill on February 16, 1955. The learned Judicial Commissioner, who heard this application, appears to have accepted the appellant's case that Ramlal was ill on February 16 and that if only one day's delay had to be explained satisfactorily by the appellant his illness would constitute sufficient explanation; but it was urged before him by the respondent that the appellant had not shown that its partners were diligent during the major portion of the period of limitation allowed for appeal, and since they put off the filing of the appeal till the last date of the period of limitation the illness of Ramlal cannot be said to be sufficient cause for condoning the delay though it was only one day's delay. On the other hand, the appellant urged that it had a right to file the appeal on the last day and so the delay of one day which it was required to explain by sufficient reason had been satisfactorily explained. The learned Judicial Commissioner, however, accepted the plea raised by the respondent and in substance refused to excuse delay on the ground that the appellant's partner had showed lack of diligence and negligence during the whole of the period of limitation allowed for the appeal. It is on this ground that the application for condonation of delay was rejected and the appeal was dismissed on August 6, 1955.

The appellant then applied to the Judicial Commissioner for a certificate and urged that on the question of construction of section 5 of the Limitation Act there was a conflict of judicial opinion and so the point decided by the Judicial Commissioner was one of general importance. This argument was accepted by the Judicial Commissioner and so a certificate of fitness has been issued by him under Article 133 of the Constitution. It is with this certificate that the appellant has come to this Court, and the only point which has been urged on its behalf is that the Judicial Commissioner was in error in holding that in determining the question as to whether sufficient cause had been shown within the meaning of section 5 of the Limitation Act it was necessary for the appellant to explain his conduct during the whole of the period prescribed for the appeal.

Section 5 of the Limitation Act provides for extension of period in certain cases. It lays down, *inter alia,* that any appeal may be admitted after the period of limitation prescribed therefor when the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within such period. This section raises two questions for consideration. First is, what is sufficient cause; and the second, what is the meaning of the clause "within such period"? With the first question we are not concerned in the present appeal. It is the second question which has been decided by the Judicial Commissioner against the appellant. He has held that "within such period" in substance means during the period prescribed for making the appeal. In other words, according to him, when an appellant prefers an appeal beyond the period of limitation prescribed he must show that he acted diligently and that there was some reason which prevented him from preferring the appeal during the period of limitation prescribed. If the Judicial Commissioner had held that "within such period" means "the period of the delay between the last day for filing the appeal and the date on which the appeal was actually filed" he would undoubtedly have come to the conclusion that the illness of Ramlal on February 16 was a sufficient cause. That clearly appears to be the effect of his judgment. That is why it is unnecessary for us to consider what is "a sufficient cause" in the present appeal. It has been urged before us by Mr. Andley, for the appellant, that the construction placed by the Judicial Commissioner on the words "within such period" is erroneous.

In construing section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding betwen the parties. In other words, when the period of limitation prescribed as expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the Court to condone delay and admit the appeal. This discretion has been deliberately conferred on the Court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in *Krishna* v. *Chathappan* [1]

> "section 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of *bona fide* is imputable to the appellant."

1. (1890) I.L.R. 13 Mad. 269.

Now, what do the words "within such period" denote? It is possible that the expression "within such period" may sometimes mean during such period. But the question is: Does the context in which the expression occurs in section 5 justify the said interpretation? If the Limitation Act or any other appropriate statute prescribes different periods of limitation either for appeals or applications to which section 5 applies that normally means that liberty is given to the party intending to make the appeal or to file an application to act within the period prescribed in that behalf. It would not be reasonable to require a party to take the necessary action on the very first day after the cause of action accrues. In view of the period of limitation prescribed the party would be entitled to take its time and to file the appeal on any day during the said period; and so *prima facie* it appears unreasonable that when delay has been made by the party in filing the appeal it should be called upon to explain its conduct during the whole of the period of limitation prescribed. In our opinion, it would be immaterial and even irrelevant to invoke general considerations of diligence of parties in construing the words of section 5. The context seems to suggest that "within such period" means within the period which ends with the last day of limitation prescribed. In other words, in all cases falling under section 5 what the party has to show is why he did not file an appeal on the last day of limitation prescribed. That may inevitably mean that the party will have to show sufficient cause not only for not filing the appeal on the last day but to explain the delay made thereafter day by day. In other words, in showing sufficient cause for condoning the delay the party may be called upon to explain for the whole of the delay covered by the period between the last day prescribed for filing the appeal and the day on which the appeal is filed. To hold that the expression "within such period" means during such period would, in our opinion, be repugnant in the context. We would accordingly hold that the learned Judicial Commissioner was in error in taking the view that the failure of the appellant to account for its non-diligence during the whole of the period of limitation prescribed for the appeal necessarily disqualified it from praying for the condonation of delay, even though the delay in question was only for one day; and that too was caused by the party's illness.

This question has been considered by some of the High Courts and their decisions show a conflict on the point. In *Karalicharan Sarma* v. *Apurbakrishna Bajpeyi*,[1] it appeared that thepapers for appeal were handed over by the appellant to his advocate in the morning of the last day for filing the appeal. Through pressure of urgent work the advocate did not look into the papers till the evening of that day when he found that that was the last day. The appeal was filed the next day. According to the majority decision of the Calcutta High Court, in the circumstances just indicated there was sufficient cause to grant the appellant an extension of a day under section 5 of the Limitation Act because it was held that it was enough if the appellant satisfied the Court that for sufficient cause he was prevented from filing the appeal on the last day and his action during the whole of the period need not be explained. This decision is in favour of the appellant and is in accord with the view which we are inclined to take.

On the other hand, in *Kedarnath and another* v. *Zumberlal*,[2] the Judicial Commissioner at Nagpur has expressed the view that an appellant who wilfully leaves the preparation and presentation of his appeal to the last day of the period of limitation prescribed therefor is guilty of negligence and is not entitled to an extension of time if some unexpected or unforeseen contingency prevents him from filing the appeal within time. According to this decision,

1. (1931) I.L.R. 58 Cal. 549. 2. A.I.R. 1916 Nag. 39.

though the period covered between the last day of filing and the day of actual filing may be satisfactorily explained that would not be enough to condone delay because the appellant would nevertheless have to show why he waited until the last day. In coming to this conclusion the Judicial Commissioner has relied substantially on what he regarded as general considerations. "This habit of leaving things to the last moment", says the learned Judge,

> "Has its origin in laxity and negligence, and, in my opinion, having regard to the increasing pressure of business in the law Courts and the many facilities now available for the punctual filing of suits, appeals and applications therein, it is high time that litigants and their legal advisers were made to realise the dangers of the procrastination which defers the presentation of a suit, appeal or application to the last day of the limitation prescribed therefor".

There can be no difference of opinion on the point that litigants should act with due diligence and care; but we are disposed to think that such general consideration can have very little relevance in construing the provisions of section 5. The decision of the Judicial Commissioner shows that he based his conclusion more on this *a priori* consideration and did not address himself as he should have to the construction of the section itself. Apparently this view has been consistently followed in Nagpur.

In *Jahar Mal* v. *G. M. Pritchard*,[1] the Patna High Court has adopted the same line. Dawson-Miller, C.J., brushed aside the claim of the appellant for condonation of delay on the ground that

> "one is not entitled to put things off to the last moment and hope that nothing will occur which will prevent them from being in time. There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other may happen which will delay them in carrying out that part of their duties for which the Court prescribes a time limit, and if they choose to rely upon everything going absolutely smoothly and wait till the last moment, I think they have only themselves to blame if they should find that something has happened which was unexpected, but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the Court."

These observations are subject to the same comment that we have made about the *Nagpur decision*.[2]

It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for the exercise of the discretionary jurisdiction vested in the Court by section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the Court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its *bona fides* may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the Court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of *bona fides* or due diligence are always material and relevant when the Court is dealing with applications made under section 14 of the Limitation Act. In dealing with such applications the Court is called upon to consider the effect of the combined provisions of sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made

1. A.I.R. 1919 Pat. 503.
2. A.I.R. 1916 Nag. 39.

material and relevant by the provisions of section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under section 5 without reference to section 14. In the present case there is no difficulty in holding that the discretion should be exercised in favour of the appellant because apart from the general criticism made against the appellant's lack of diligence during the period of limitation no other fact had been adduced against it. Indeed, as we have already pointed out, the learned Judicial Commissioner rejected the appellant's application for condonation of delay only on the ground that it was appellant's duty to file the appeal as soon as possible within the period prescribed, and that, in our opinion, is not a valid ground.

It now remains to refer to two Privy Council decisions to which our attention was drawn. In *Ram Narain Joshi* v. *Parameswar Narain Mahta and others*,[1] the Privy Council was dealing with a case where on August 9, 1895 the High Court had made an order that the appeal in question should be transferred to the High Court under section 25 of the Code of Civil Procedure and heard along with another appeal already pending there. In making this order the High Court had given liberty to the respondent to make his objections, if any, to the said transfer. On September 16, 1895 a petition was filed on behalf of the appellant objecting to the said transfer; and the question arose whether sufficient cause had been shown for the delay made by the party between August 9, 1895 to September 16, 1895. The decree under appeal had been passed on June 25, 1894 and the appeal against the said decree had been presented to the District Judge on September 3, 1894. It would thus be seen that the question which arose was very different from the question with which we are concerned; and it is in regard to the delay made between August 9, 1895 to September 16, 1895 that the Privy Council approved of the view taken by the High Court that the said delay had not been satisfactorily explained. We do not see how this decision can assist us in interpreting the provisions of section 5.

The next case on which reliance has been placed by the respondent is *Brij Inder Singh* v. *Kanshi Ram and others*.[2] The principal point decided in that case had reference to section 14 read with section 5 of the Limitation Act, 1908; and the question which it raised was whether the time occupied by an application in good faith for review, although made upon a mistaken view of the law, should be deemed as added to the period allowed for presenting an appeal. As we have already pointed out, when the question of limitation has to be considered in the light of the combined operation of sections 14 and 5 of the Limitation Act the conditions expressly imposed by section 14 have to be satisfied. It would, however, be unreasonable to suggest that the said conditions must to the same extent and in the same manner be taken into account in dealing with applications falling under section 5 of the Limitation Act.

It appears that the provisions of section 5 in the present Limitation Act are substantially the same as those in section 5 (*b*) and section 5, paragraph 2, of the Limitation Acts of 1871 and 1877 respectively. Section 5-A which was added to the Limitation Act of 1877 by the amending Act VI of 1892 dealt with the topic covered by the *Explanation* to section 5 in the present Act. The *Explanation* provides, *inter alia*, that the fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or comput-

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1. (1902-03) L.R. 30 I.A. 20 : I.L.R. 30 Cal. 309 (P.C.).

2. (1916-17) 33 M.L.J. 486 : L.R. 44 I.A. 218 : I.L.R. 45 Cal. 94 (P.C.).

ing the prescribed period of limitation may be sufficient cause within the meaning of section 5. The effect of the *Explanation* is that if the party who has applied for extension of period shows that the delay was due to any of the facts mentioned in the *Explanation* that would be treated as sufficient cause, and after it is treated as sufficient cause the question may then arise whether discretion should be exercised in favour of the party or not. In the cases to wwhich the *Explanation* applies it may be easy for the Court to decide that the discretion should be exercised in favour of the party and delay should be condoned. Even so, the matter is still one of discretion. Under section 5-A of the Act of 1877, however, if the corresponding facts had been proved under the said section there appears to have been no discretion left in the Court because the said section provided, *inter alia,* that whenever it was shown to the satisfaction of the Court that an appeal was presented after an expiration of the period of the limitation prescribed owing to the appellant having been misled by any order, practice or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall, for all purposes be deemed to have been presented within the period of limitation prescribed therefor. That, however, is a distinction which is not relevant in the present appeal.

In the result, the appeal is allowed, the delay of one day made in filing the appeal is condoned, and the case sent back to the Court of the Judicial Commissioner for disposal on the merits in accordance with law. In the circumstances of this case the appellant should pay the respondent the costs of this Court. Costs incurred by the parties in the Court of the Judicial Coommissioner so far will be costs in the appeal before him.

Appeal allowed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

Purushottamdas Dalmia .. *Appellant**

v.

The State of West Bengal .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 239 and 177—Offence of conspiracy committed within, jurisdiction and offences in pursuance of it committed outside jurisdiction—Court having jurisdiction to try offence of conspiracy can try also the offences committed in pursuance of the conspiracy.

The Court having jurisdiction to try the offence of criminal conspiracy can also try offences committed in pursuance of that conspiracy even if those offences were committed outside the jurisdiction of that Court, as the provisions of section 239, Criminal Procedure Code, are not controlled by the provisions of section 177, Criminal Procedure Code, which do not create absolute prohibition against the trial of offences by a Court other than the one within whose jurisdiction the offence is committed.

Jiban Banerjee v. *State,* A.I.R. 1959 Cal. 500, overruled.

Appeal by Special Leave from the Judgment and Order, dated the 16th May, 1958, of the Calcutta High Court in Criminal Appeal No. 2 of 1958.

A. S. R. Chari, Senior Advocate (*K. C. Jain* and *B. P. Maheshwari,* Advocates, with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*H. R. Khanna* and *D. Gupta,* Advocates, with him), for Respondent.

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*Criminal Appeal No. 51 of 1959. 19th April, 1961.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, is from the order of the Calcutta High Court, dated May 16, 1958, summarily dismissing the appeal of the appellant from the order of the learned Single Judge of the High Court convicting him on jury trial of offences under section 120-B read with section 471, Indian Penal Code, and on two counts under section 471 read with section 466, Indian Penal Code, with respect to two documents. L. N. Kalyanam, who was also tried at the same trial and convicted of the offences under section 120-B read with section 471, Indian Penal Code, two counts under section 466, Indian Penal Code, and of the offence under section 109, read with section 471, Indian Penal Code, did not appeal against his conviction.

The brief facts of the prosecution case are that the appellant Purushottam-Dalmia was one of the partners of the firm known as Laxminarayan Gourishankar which had its head office at Gaya and branch at Calcutta. The Calcutta branch was located at 19, Sambhu Mallick Lane. On April 26, 1952 the appellant applied for a licence for importing rupees one crore worth of art silk yarn. On May 2, 1952, the Joint Chief Controller of Imports, Calcutta, issued a provisional licence. In accordance with the rules, this licence was to be got confirmed within two months by the Deputy or Chief Controller of Imports and on such confirmation it was to be valid for a period of one year. The licence was to be treated as cancelled in case it was not got confirmed within two months of the date of issue. This provisional licence was not confirmed within two months. The appellant was duly informed of the refusal to confirm the licence. The appellant's appeal against the refusal to confirm the licence was dismissed in September 1952. The provisional licences issued were returned to the appellant. The letter communicating the dismissal of the appeal and the return of the licence was issued from the office of the Joint Chief Controller of Imports on September 26, 1952.

The letter dated September 29, 1952, from the office of the Chief Controller of Imports, New Delhi, informed the appellant with reference to the letter dated September 4, 1952, that instructions had been issued to the Joint Chief Controller of Imports and Exports, Calcutta, for re-consideration of such cases and that he was advised to contact that authority for further action in the matter. The appellant rightly, did not appear to take this letter to mean that the order of rejection of his appeal was still under further consideration. He did not take any steps to contact the Joint Controller of Imports and Exports on the basis of this letter. Instead, he applied on October 7, 1952, for the return of correspondence. That correspondence was returned to him on October 9, 1952.

Nothing happened up to March 31, 1953, on which date the appellant wrote to the Chief Controller of Imports, New Delhi, a long letter expressing his grievance at the action of the Joint Chief Controller of Imports and Exports, Calcutta, and requesting for a sympathetic decision. The Chief Controller of Imports and Exports, by his letter dated April 20, 1953, informed the appellant that the order of the Joint Chief Controller of Imports and Exports could not be revised for the reasons mentioned in that letter. This letter gave the wrong number of the appellant's firm. It mentioned its number as '16' instead of the correct number '19'. In other respects the address of this letter was correct. The appellant states that he did not receive this letter.

In August 1953, the appellant met Kalyanam at Calcutta. Kalyanam told the appellant that he could get the licence validated through the good offices of one of his acquaintances, Rajan by name, at Delhi. Both these persons came to Delhi in August 1953 and visited Rajan. The appellant made over the file containing the licences to Kalyanam who in his turn made over the same to Rajan. Two or three days later Kalyanam returned the licences containing the alleged forged endorsements to the appellant. The forged endorsements related to the confirmation of the licence and its re-validation till May 2, 1954. The confirmation endorsement was purported to be dated July 2, 1952, and the re-validating one purported to be dated April 25, 1953.

Thereafter, orders were placed on the basis of the re-validated licence and when the goods arrived attempt was made to clear them at Madras. The clearing office at Madras suspected the genuineness of the confirmation and re-validating endorsements and finding the suspicion confirmed, made over the matter to the Police. As a result of the investigation and preliminary enquiry, the appellant and Kalyanam were committed to the High Court for trial.

Eight charges were framed. The first charge related to the criminal conspiracy between the two accused and was as follows:

"That the said (1) Purushottamdas Dalmia and (2) L. N. Kalyanam along with person or persons name or names unknown between the months of April and December one thousand nine hundred and fifty three at Calcutta, Howrah, Delhi, Madras and other places were parties to a criminal conspiracy to commit an offence punishable with rigorous imprisonment for two years or upwards, to wit an offence of forgery by certificate or endorsement of confirmation and an endorsement of validation of the Import Trade Control Licence being licence No. 331913 of 1948 (the Exchange Control Copy whereof is Exhibit 5 and the Customs Copy whereof is Exhibit 6) purporting to be made by public servant, to wit, the officers and staff of the Chief Controller of Imports and Exports and/or the offence of fraudulently or dishonestly using the aforesaid licence containing the aforesaid forged certificates and endorsements as to the confirmation and validation thereof knowing or having reason to believe the same to be forged documents and thereby they the said (1) Purushottamdas Dalmia and (2) L. N. Kalyanam committed an offence punishable under section 120-B read with section 466 and/or section 471 read with section 466 of the Indian Penal Code within the cognizance of this Court."

Charges Nos. 2, 3 and 4 were with respect to the false endorsements on the copy of the licence Exhibit 5. The second charge was under section 466, Indian Penal Code, against Kalyanam alone and charges Nos. 3 and 4 were against the appellant for abetting the offence of forgery by Kalyanam and of using the forged document as genuine. Charges 5, 6 and 7 related to corresponding matters with respect to the licence copy Exhibit 6. The eighth charge was against Kalyanam alone and was for his abetting the appellant in his committing the offence of fraudulently and dishonestly using as genuine the Customs Copy of the said licence, Exhibit 6.

The jury returned a verdict of 'not guilty' with respect to charges Nos. 3 and 6 and also with respect to the charge of conspiracy under section 120-B read with section 466, Indian Penal Code. The jury returned a verdict of 'guilty' against the appellant on the charge of conspiracy under section 120-B read with section 471, Indian Penal Code, and the other charges Nos. 4 and 7.

It is not disputed, and cannot be disputed, that forgeries were committed in the two documents Exhibits 5 and 6. The following points were raised by learned counsel for the appellant:

(*i*) The offences of using the forged documents as genuine were committed at Madras and therefore the Courts at Calcutta had no jurisdiction to try these offences under section 471 read with section 466, Indian Penal Code.

(*ii*) Alternative conspiracies could not be charged as they must be the result of different agreements between the conspirators.

(*iii*) The learned Judge misdirected the jury in putting certain matters before it in the form he had done. The chief criticisms in this connection were that (*a*) the accused must have known from the ante-dating of the confirmation endorsement that the re-validation of the licence was a forgery; (*b*) even if the proper officer of the Department had signed the re-validation, it would still be a forgery when it was ante-dated; (*c*) the letter of the Chief Controller of Imports and Exports dated April 20, 1953, though wrongly addressed, must have reached the appellant; (*d*) the learned Judge expressed his opinions strongly and this could have unduly affected the mind of the jury and forced it to come to the same conclusions.

The jurisdiction of the Calcutta High Court to try an offence of criminal conspiracy under section 120-B, Indian Penal Code, is not disputed. It is also not disputed that the overt acts committed in pursuance of the conspiracy were committed in the course of the same transaction which embraced the conspiracy and the acts done under it. It is however contended for the appellant, in view of section 177 of the Code of Criminal Procedure, that the Court having jurisdiction to try the offence of conspiracy cannot try an offence constituted by such overt acts which are committed beyond its jurisdiction and reliance is placed on the decision in *Jiban Banerjee* v. *State*.[1] This case undoubtedly supports the appellant's contention. We have considered it carefully and are of opinion that it has not been rightly decided.

The desirability of the trial, together, of an offence of criminal conspiracy and of all the overt acts committed in pursuance of it, is obvious. To establish the offence of criminal conspiracy, evidence of the overt acts must be given by the prosecution. Such evidence will be necessarily tested by cross-examination on behalf of the accused. The Court will have to come to a decision about the credibility of such evidence and, on the basis of such evidence, would determine whether the offence of criminal conspiracy has been established or not. Having done all this, the Court could also very conveniently record a finding of 'guilty' or 'not guilty' with respect to the accused said to have actually committed the various overt acts. If some of the overt acts were committed outside the judrisdiction of the Court trying the offence of criminal conspiracy and if the law be that such overt acts could not be tried by that Court, it would mean that either the prosecution is forced to give up its right of prosecuting those accused for the commission of those overt acts or that both the prosecution and the accused are put to unnecessary trouble inasmuch as the prosecution will have to produce the same evidence a second time and the accused will have to test the credibility of that evidence a second time. The time of another Court will be again spent a second time in determining the same question. There would be the risk of the second Court coming to a different conclusion from that of the first Court. It may also be possible to urge in the second Court that it is not competent to come to a different conclusion in view of what has been said by this Court in *Pritam Singh* v. *The State of Punjab*,[2] at page 422:

> "The acquittal of Pritam Singh Lohara of that charge was tantamount to a finding that the prosecution had failed to establish the possession of the revolver Exhibit P-56 by him. The possession of that revolver was a fact in issue which has to be established by the prosecution before he could be convicted of the offence with which he had been charged. That fact was found against the prosecution and having regard to the observations of Lord MacDermott quoted above, could not be proved against Pritam Singh Lohara in any further proceedings between the Crown and him."

In these circumstances, unless the provisions of the Code of Criminal Procedure admit of no other construction than the one placed upon them by the Calcutta High Court, they should be construed to give jurisdiction to the Court

1. A.I.R. 1959 Cal. 500.
2. A.I.R. 1956 S.C. 415.

trying the offence of criminal conspiracy to try all the overt acts committed in pursuance of that conspiracy. We do not find any compelling reasons in support of the view expressed by the Calcutta High Court.

It is true that the Legislature treats with importance the jurisdiction of Courts for the trial of offences Jurisdiction of Courts is of two kinds. One type of jurisdiction deals with respect to the power of the Courts to try particular kinds of offences. That is a jurisdiction which goes to the root of the matter and if a Court not empowered to try a particular offence does try it the entire trial is void. The other jurisdiction is what may be called territorial jurisdiction. Similar importance is not attached to it. This is clear from the provisions of sections 178, 188, 197 (2) and 531, Criminal Procedure Code. Section 531 provides that:

"No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice."

The reason for such a difference in the result of a case being tried by a Court not competent to try the offence and by a Court competent to try the offence but having no territorial jurisdiction over the area where the offence was committed is understandable. The power to try offences is conferred on all Courts according to the view the Legislature holds with respect to the capability and responsibility of those Courts. The higher the capability and the sense of responsibility, the larger is the jurisdiction of those Courts over the various offences. Territorial jurisdiction is provided just as a matter of convenience, keeping in mind the administrative point of view with respect to the work of a particular Court, the convenience of the accused who will have to meet the charge levelled against him and the convenience of the witnesses who have to appear before the Court. It is therefore that it is provided in section 177 that an offence would ordinarily be tried by a Court within the local limits of whose jurisdiction it is committed.

It was said in *Assistant Sessions Judge, North Arcot* v. *Ramaswami Asari*,[1] at page 782:

"The scheme of Chapter XV, sub-chapter (A) in which sections 177 to 189 appear, seems to me to be intended to enlarge as much as possible the ambit of the sites in which the trial of an offence might be held and to minimise as much as possible the inconvenience which would be caused to the prosecution, by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying Court."

It is further significant to notice the difference in the language of section 177 and section 233. Section 177 simply says that ordinarily every offence would be tried by a Court within the local limits of whose jurisdiction it was committed. It does not say that it would be tried by such Court except in the cases mentioned in sections 179 to 185 and 188 or in cases specially provided by any other provision of law. It leaves the place of trial open. Its provisions are not peremptory. There is no reason why the provisions of sections 233 to 239 may not also provide exceptions to section 177, if they do permit the trial of a particular offence along with others in one Court. On the other hand, section 233, dealing with the trial of offences, reads:

"For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239."

The language is very peremptory. There is a clear direction that there should be a separate charge for every distinct offence and that any deviation

1. (1914) 26 M.L.J. 235: I.L.R. 38 Mad. 779.

from such a course would be only in cases mentioned in sections 234, 235, 236 and 239.

It is true that it is not stated in express terms either in section 235 or section 239, that their provisions would justify the joint trial of offences or of persons mentioned therein in a Court irrespective of the fact whether the offnces to be tried were committed within the jurisdiction of that particular Court or not. But such, in our opinion, should be the interpretation of the provisions in these two sections. The sections do not expressly state that all such offences which can be charged and tried together or for which various persons can be charged and tried together must take place within the jurisdiction of the Court trying them. The provisions are in general terms. Sub-sections (1) to (3) of section 235 provide for the offences being charged with and tried at one trial and therefore provide for the trial of those offences at one trial in any Court which has jurisdiction over any of the offences committed in the course of the same transaction. The illustrations to section 235 also make no reference to the places where the offences were committed. In particular, *Illustration* (c) can apply even when the offences referred to therein were committed at places within the territorial jurisdiction of different Courts. Similarly, section 239 provides for the various persons being charged and tried together for the same offence committed in the course of the same transaction or accused of different offences committed in the course of the same transaction. Such offences or persons would not be tried together if some of the offences are committed by some of them outside the jurisdiction of the Court which can try the other offences, if the contention for the appellant be accepted and that would amount to providing, by construction, an exception for these sections.

As sections 235 and 239 of the Code are enabling sections, the Legislature, rightly, did not use the expression which would have made it incumbent on the Court to try a person of the various offences at one trial or to try various persons for the different offences committed in the course of the same transaction together. The omission to make such peremptory provision does not necessarily indicate the intention of the Legislature that the Court having jurisdiction to try certain offences cannot try an offence committed in the course of the same transaction, but beyond its jurisdiction.

No definite conclusion about the approval of the Legislature to the interpretation put on the provisions of sections 235 and 239, Criminal Procedure Code, by the Calcutta High Court in *Bisseswar* v. *Emperor*[1] or by the Madras High Court in In re *Dani*[2] and in *Sachidanandam* v. *Gopala Ayyangar*[3] can be arrived at when it is found that there had been some cases which expressed the contrary view. The case-law having a bearing on the question under determination is, however, meagre.

In *Gurdit Singh* v. *Emperor*[4] the conspiracy to murder a person was entered into in the district of Montgomery in Punjab and the attempt to murder that person in pursuance of that conspiracy was made within the jurisdiction of the Magistrate at Roorkee in the United Provinces, Broadway, J., said at page 517:

> "It appears that, rightly or wrongly, an allegation has been made that the abetment by conspiracy or by instigation took place in the Montgomery District, and that, therefore, the case can be tried either at Roorkee or in Montgomery. Section 180, Criminal Procedure Code, is clear on this point and no further discussion is needed."

In In re *Govindaswami*[5] a person murdered *A* and *B* one after the other, in the same night. The houses of *A* and *B* were divided by a street which

1. A.I.R. 1934 Cal. 1034.
2. A.I.R. 1936 Mad. 317.
3. (1929) 57 M.L.J. 518 : A.I.R. 1929 Mad. 839: I.L.R. 52 Mad. 991.
4. (1917) 18 Crl.L.J. 514.
5. (1952) 2 M.L.J. 751 : A.I.R. 1953 Mad. 372.

formed the boundary between two districts. The accused was sent up for trial for the murders of *A* and *B* to the various Courts having jurisdiction to try the offences of the murder of *A* and of the murder of *B*. The learned Judges said at page 373:

"There is a further aspect of the case on which we would like to make some observations. These two cases of alleged murder by the same appellant one after the other that same night brought as they were into the same confession should obviously have been tried by one and the same Sessions Judges. The street between the houses of Govindan Servai and Malayappa Konan appears however to have been a boundary between the districts of Tiruchirapalli and Tanjore and one murder was committed in the jurisdiction of the Sessions division of Tiruchirapalli and the other in the jurisdiction of the Sessions division of Tanjore. This appears to have been the only reason why two separate charge-sheets were laid in respect of these murders. The learned Public Prosecutor agrees that there was no impediment to the two murders being tried together under section 234 (1), Criminal Procedure Code and it is indeed obvious that one Court should have dealt with both these murders."

The two cases could not be tried by any one of the two Sessions Courts if the provisions of section 234, Criminal Procedure Code, were subject to the provisions of sections 177 to 188 with respect to the territorial jurisdiction of Criminal Courts.

In *Sachidanandam* v. *Gopala Ayyangar*[1] Odgers, J., relying on the case reported as *Bisseswar* v. *Emperor*[2] held that unless the abetment of an offence took place within its territorial jurisdiction, a Court could not avail itself of the provisions of section 239 to try such abetment along with the principal offence. He observed at page 994:

"I am doubtful about the matter, I must say; but giving the best consideration I can to it, and with this expression of opinion of the Calcutta High Court, I am inclined to think that jurisdiction being the foundation of the charge, is to be imported or understood as present in all the subsequent procedure set out in the Code; and if that is so, it clearly must govern section 239."

The approval of the Legislature of a particular construction put on the provisions of an Act on account of its making no alteration in those provisions is presumed only when there had been a consistent series of cases putting a certain construction on certain provisions.

Lastly, an implied support to the view we are inclined to take is to be obtained from the observations of the Judicial Committee in *Babulal Choukhani* v. *The King Emperor*[3] at page 175:

"Nor is there any limit of number of offences specified in section 239 (*d*). The one and only limitation there is that the accusation should be of offences 'committed in the course of the same transaction'. Whatever scope of connotation may be included in the words 'the same transaction', it is enough for the present case to say that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators), these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy serve to unify the acts done in pursuance of it."

This indicates that the only limitation on the jurisdiction of the Court to charge and try together various persons in pursuance of the provisions of clause (*a*) of section 239, Criminal Procedure Code, is that the accusation against those persons should be of offences committed in the course of the same transaction. It cannot be disputed that the accusation against the accused with respect to the overt acts committed by them in pursuance of a conspiracy is with respect to offences committed in the course of the same transaction and that therefore persons accused of these offences can be tried together at one trial in pursuance of the provisions of clause (*a*) of section 239. We therefore hold that the Calcutta Court had jurisdiction to try the appellant of the offences under section 471 read with section 466, Indian Penal Code,

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1. (1929) 57 M.L.J. 518: I.L.. 52 Mad. 991: A.I.R. 1929 Mad. 839.
2. A.I.R. 1924 Cal. 1034.
3. (1938) 1 M.L.J. 647: L.R. 65 I.A. 158 (P.C.).

even though those offences, in pursuance of the conspiracy, were committed at Madras.

The second contention for the appellant is really to the effect that the appellant was charged with two conspiracies in the alternative and that such a charge is unwarranted by law. This, however, is not the correct interpretation of the charge of conspiracy framed against the appellant. The charge was one of conspiracy, it being a conspiracy to commit an offence punishable with rigorous imprisonment for two years or upwards. The particular offence to be committed was described in the alternative. One was to commit an offence of forgery and to use the forged document and the other was the offence of fraudulently or dishonestly using the licence containing the forged certificates and endorsements. The expression 'and|or' in the first charge simply meant that the offences they had conspired to commit consisted either of the offence to commit forgery and subsequently to use the forged document as genuine or the object was merely to use the licence with forged endorsements even though there was not any conspiracy to commit forgeries in the licences. In other words, the charge was that the appellant and Kalyanam entered into a conspiracy to commit offences punishable with rigorous imprisonment for two years or upwards and that the offences contemplated to include the offence of using the licence with forged endorsements and may also include the offence of forging the licence. Thus, there was no case of two alternative conspiracies. The conspiracy was one and it being doubtful what the facts proved would establish about the nature of offences to be committed by the conspirators, the charge illustrated the offence in this form. In his charge to the jury the learned Judge said at page 14:

"In this case from the circumstances, it may not be very clear whether they actually made an agreement among themselves to do or cause to be done forgery of the document or whether they merely agreed to use it as a genuine document knowing that it was a forged document. Therefore, the charge is in the alternative that either they agreed among themselves to do or cause to be done the forgery of this document or rather, the forgery of the endorsements of confirmation or revalidation; or in the alternative, they agreed among themselves regarding user of such a forged document knowing that it is forged. So both 'and/or' is mentioned in the charge, either they agreed to commit forgery or they agreed to use it knowing it is forged or they agreed to do both, both to commit forgery and use it knowing it to be a forged document."

Such a charge is justified by the provisions of section 236 of the Code. We are therefore of the opinion that the charge of conspiracy does not suffer from any illegality.

We have carefully considered all that has been said in connection with the alleged misdirections in the charge to the jury and are of opinion that the charge does not suffer from this defect. The Judge has at places expressed in unequivocal language what appears to him to be the effect of certain pieces of evidence. But that, in our opinion, has not been in such a setting that it be held that the jury must have felt bound to find in accordance with that opinion. The Judge has, at various places, stated that the jury was not bound by his opinion, that it had to come to its own conclusion on questions of fact and that it was the function of the jury to decide all questions of fact.

There is nothing wrong in telling the jury that even if the endorsements had been made by the proper departmental officer and they were ante-dated, forgery would have been committed. That is the correct proposition of law. The ante-dated document would be a false document. Knowledge of ante-dating the endorsements, naturally conveyed knowledge of the commission of forgery.

The mistake in the letter, dated April 20, 1953, from the Chief Controller of Imports and Exports, is not such as to lead to the conclusion that the letter could not have been delivered to the proper addressee. The appellant's firm

is located at 19, Sambhu Mallick Road and the address of this letter gave the number as 16. Shop No. 16 could not have been at much distance from Shop No. 19. The postman delivering letters at the two shops must be the same. Postmen get to know the regular addressees by their names and ordinarily locate them even if there be some slight error or even omission in the address. The letter addressed to the appellant's firm is not proved to have returned to the dead-letter office or to the Chief Controller of Imports and Exports. If it was delivered by the postman at the Shop No. 16, ordinary courtesy requires that that shop would have sent over the letter to the neighbouring Shop No. 19. The appellant's conduct in not taking any action to find out what was the result of his representation to the Chief Controller of Imports and Exports is consistent with the view that he did receive the reply of the Chief Controller of Imports and Exports. In the circumstances, an expression of opinion that the letter would have reached the appellant cannot be said to amount to a misdirection.

The learned Judge is perfectly justified to ask the jury to take into consideration the probabilities of a case, where no definite evidence, in connection with an incidental matter, exists.

We do not consider that the contentions raised do amount to misdirections.

In view of the above, we see no force in this appeal and accordingly dismiss it.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT:—K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

M. V. Joshi .. *Appellant**

v.

M. U. Shimpi and another .. *Respondents.*

Prevention of Food Adulteration Act (*XXXVII of* 1954), *Section* 16 (1) (a)—*Selling butter below prescribed standard—Offence—Irrebuttable presumption of adulteration—Prevention of Food Adulteration Rules,* 1955—*Rule A*-11.05 *of Appendix B*—"*Butter*"—*If includes butter prepared from curds.*

Under the Prevention of Food Adulteration Act selling butter below the prescribed standard is deemed to be adulteration. If the standard is not maintained, the butter, by a fiction, becomes an adulterated food. A dealer in such butter cannot adduce evidence to prove that notwithstanding the deficiency in the standard, it is not adulterated. Butter prepared from curd comes within the definition of "butter" in rule A. 11.05 of Appendix B to the Prevention of Food Adulteration Rules, 1955. *Butter* is defined in Rule A. 11.05 as the product of *milk* or *cream* of cow or buffalo. It is butter made from milk. [On April 16, 1960, the Central Government made another rule amending rule A. 11.05 by inserting the word "curd" in the definition of butter and the amended definition reads, "butter means the product prepared exclusively from milk, cream or curd of cow or buffalo. . . ."]

Appeal by Special Leave from the Judgment and Order dated the 23rd July, 1959, of the Bombay High Court in Criminal Appeal No. 165 of 1959.

H. J. Umrigar, Advocate and *Messrs. S. N. Andley, J. B. Dadachanji; Rameshwar Nath* and *Ravinder Narain,* Advocates of *Messrs. Rajinder Narain & Co.,* for Appellant.

Naunit Lal, Advocate for Respondent No. 1.

B. K. Khanna and *R. H. Dhebar,* Advocates for Respondent No. 2.

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*Crl. A. No. 155 of 1959. 27th February, 1961.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is directed against the judgment of the High Court ot Judicature at Bombay allowing the appeal filed by respondent No. 1 against the acquittal of the appellant by the Judicial Magistrate, First Class, Thana, and convicting him under section 16 (1), read with section 7 (*i*), of the Prevention of Food Adulteration Act, 1954 (hereinafter called the Act), and sentencing him to undergo rigorous imprisonment for two months and to pay a fine of Rs. 250.

The appellant is the proprietor of a shop at Thana known as the Cottage Industries. He is a dealer in butter. On June 27, 1957, the Food Inspector of the Thana Borough Municipality visited the shop of the appellant and purchased from him some quantity of Khandeshi butter. After purchasing the butter, the Food Inspector notified his intention to the appellant that he was going to get the butter analysed. He divided the butter into three equal parts, put them in three separate bottles and duly sealed the bottles in the presence of two *panchas*. He gave one of these bottles to the appellant sent one to the Public Analyst and kept the third with himself. The appellant signed the labels on the bottles and also passed a receipt in favour of the Food Inspector in token of the receipt of one of the bottles and that receipt was signed by the appellant and countersigned by two *panch* witnesses.

The Public Analyst analysed the butter sent to him and sent his report in due course. In the report it was stated that the butter contained 18·32 per cent. foreign fat, 19.57 per cent. moisture and 64.67 per cent. milk fat.

On October 5, 1957, the Food Inspector filed a complaint in the Court of the Judicial Magistrate, First Class, Thana, against the appellant. It was alleged therein that the said butter was found to be "adulterated" as defined in section 2 (1) (*a*) of the Act and that the appellant had committed an offence under section 16 (1) (*a*) of the Act by selling the adulterated article of food in contravention of section 7 (*i*) of the Act and the rules made thereunder. The Judicial Magistrate acquitted the appellant on the ground that it had not been proved beyond reasonable doubt that the butter which was purchased from the shop of the appellant was the very same butter which was sent to the Public Analyst and also for the reason that butter prepared out of curd did not come within the mischief of the definition of the word "butter" in rule A. 11.05 of Appendix B to the Prevention of Food Adulteration Rules, 1955 (hereinafter called the Rules). The Food Inspector preferred an appeal against that order of acquittal to the High Court. The High Court held that the conclusion of the learned Judicial Magistrate that the butter purchased from the appellant might have been tampered with before it was sent to the public Analyst was not based on any evidence on the record. It further held that butter prepared from curds was covered by the definition of the word "butter" given in the relevant rule. It further held that even if the butter prepared out of curds was not butter as defined in the said rule, the appellant would still be liable under section 2 (1) (*a*) of the Act as it contained foreign fat and, therefore, was an adulterated article of food within the meaning of the said section. In the result it set aside the order of acquittal, convicted the appellant under the Act and sentenced him to rigorous imprisonment for two months and to pay a fine of Rs. 250. Hence this appeal.

Learned counsel for the appellant raised before us the following points: (1) The High Court went wrong in holding that the appellant had committed an offence under the Act, even though the butter in question was not butter within the meaning of the Rules. (2) Butter prepared from curds is not butter within the meaning of rule A. 11.05 of Appendix B to the Rules. (3) Butter sent to

the Public Analyst was not the same butter seized from the appellant. (4) The report of the Public Analyst was vague and, therefore, no conviction could be based on it.

For the purpose of this appeal we are assuming in favour of the appellant that he would not be liable for conviction unless the butter seized from him was butter within the meaning of the rule. We shall proceed to consider the appeal on that basis. In this view, nothing further need be said on the first question raised by learned counsel.

At the outset it would be convenient to consider the ingredients of the offence alleged to have been committed by the appellant. Section 2 (*i*) of the Act defines the word "adulterated" and it says that an article of food shall be deemed to be adulterated if it satisfies one or other of the conditions prescribed in sub-clauses (*a*) to (*l*). We are concerned in this appeal with sub-clause (*l*) whereunder an article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability. Section 2 (*xii*) defines "prescribed" to mean "prescribed by rules made under this Act". In exercise of the powers conferred by sub-section (2) of section 4 and sub-section (1) of section 23 of the Act, the Central Government made rules prescribing, *inter alia,* the standards of quality of different articles of food. Rule 5 says that standards of quality of the various articles of food specified in Appendix B to the Rules are as defined in that appendix. Rule A. 11.05 of Appendix B to the Rules defines "butter" to mean "the product prepared exclusively from the milk or cream of cow or buffalo, or both, or without the addition of salt and annatto and shall contain not less than 80 per cent. of milk fat and not more than 16 per cent. of moisture" and no preservative is permissible in butter. Therefore, if the quality or purity of butter falls below the standard prescribed by the said rule or its constituents are in excess of the prescribed limit of variability, it shall be deemed to be adulterated within the meaning of section 2 of the Act. If the prescribed standard is not attained, the statute treats such butter, by fiction, as an adulterated food, though in fact it is not adulterated. To put it in other words, by reason of the fiction, it is not permissible for an accused to prove that, though the standard prescribed is not attained, the article of food is in fact not adulterated. The non-conformity with the standard prescribed makes such butter an adulterated food. Section 7 of the Act prohibits the manufacture, sale, storage or distribution of such food. Section 16 provides a penalty for the contravention of the provisions of section 7. The first question, therefore, that falls for consideration is whether the butter seized from the appellant was butter as defined by rule A. 11.05 of Appendix B to the Rules.

Learned counsel for the appellant argues that butter prepared from curd is not butter as defined in the Act for the following reasons: (1) the definition of the word "butter" does not include the product which is obtained from curd, as it refers only to a product which is prepared from milk or cream; (2) the three words, "milk", "cream" and "curd", are separately and exhaustively defined in the Rules and, therefore, the omission of the word "curd" in the said rule is a clear legislative indication that butter prepared from curd is not butter within the meaning of that rule; and (3) the word "exclusively" found in the rule emphasizes the fact that butter to come under the definition in the Act should have been prepared from milk or cream and from no other product.

Before considering the argument advanced, it would be necessary to notice how butter is made. In England, butter is made as follows:

". . . . . .as quickly as the milk is separated the cream is cooled. The cream is delivered to the creamery, where it is graded according to at least two classes, sweet and sour. . . . . .Then it is pasteurized, and if ripened cream butter is to be made a pure culture of *Streptococcus lactis* is introduced to start the desirable souring process. If sweet cream butter is to be made no starter is added. The best storage butter is made from unripened or sweet cream. After pasteurization and ripening the cream is held overnight, when it is churned, washed, salted and worked in the combined churn and worker." (*See Encyclopaedia Britannica*, Vol. 4, page 469).

In India butter is prepared in the rural areas by the indigenous process out of soured milk and cream, *i.e.*, curd. In some cities butter is also made directly out of milk and cream; but the percentage of the said production is insignificant compared with the indigenous system obtaining throughout India. Whatever process is adopted, whether butter is taken directly out of milk or taken out of soured milk or cream, it is prepared only from milk. The only difference between the two is that in the case of butter prepared from curd there is an intervening souring process which is not necessary in the case of butter directly prepared from milk or cream. Shortly stated, butter, by whatever process it is prepared, is a product prepared from milk.

Now let us look at the relevant rules to consider whether they provide any reasonable basis for sustaining the argument advanced by learned counsel for the appellant. We shall now read the relevant rules of Appendix B to the Rules:—

A. 11.01. Milk means the normal clean and fresh secretion obtained by complete milking of the udder of a healthy cow, buffalo, goat or sheep during the period following at least 72 hours after calving or until colostrum free whether such secretion has been processed or not.

A. 11.05 Butter means the product prepared exclusively from the milk or cream of cow or buffalo, or both, or without the addition of salt and annatto and shall contain not less than 80 per cent. of milk fat and not more than 16 per cent. of moisture. No preservative is permissible in butter.

A. 11.06. *Dahi or curd* : (*a*) Whole milk dahi or curd means the product obtained from fresh whole milk either of cow or buffalo by souring. It shall not contain any ingredient not found in milk.

A. 11.10. Cream means the portion of milk rich in milk fat which has risen to the surface of milk on standing and has been removed or which has been separated from milk by centrifugal force. It shall contain not less than 40 per cent. of milk fat and shall not contain any added substance. The fat separated from cream shall conform to the specification prescribed for ghee.

A. 11.14 Ghee means the pure clarified fat derived solely from milk or from milk curds or from cream to which no colouring matter or preservative has been added.

It was asked with some plausibility that if the rule making authority did not intend to make a distinction, in the context of making butter, between milk, cream and curd, why did it define the said three products separately, and why, in the case of butter, curd was not shown as one of the products from which it could be prepared, while in the case of ghee, it was shown as a separate produce from which ghee could be prepared. The first criticism can easily be answered. Milk, cream and butter have got to be separately defined, for they are sold in those three different forms, and the question of adulteration of the said products would have to be considered separately in regard to the standards prescribed for them. There is also no force in the second criticism. The original rules were framed on September 12, 1955, and the definition of ghee was introduced therein in 1956. The authority making the subsequent rule might have thought of clarifying the definition of ghee to steer clear of the difficulties raised in the case of the definition of butter. Putting aside the general argument, let us now look at the relevant provisions. The following words in the definition stand out prominently: "product prepared exclusively from milk or cream of cow or buffalo, or both". To be butter it should comply with the following conditions: (*i*) it shall be a product from milk or cream; (*ii*) the said milk or cream shall be that of cow or buffalo, or of both; (*iii*) the product shall be prepared from the said milk; and (*iv*) it shall be prepared exclusively from the said milk. "Product" means "a thing produced

by nature or a natural process or manufacture". What is the meaning of the word "prepared"? The Rules use different words for different milk products. In the case of butter, milk and curd, the word used is "obtained"; and in the case of ghee the word used is "derived". The dictionary meaning of the word "prepare" is, "to bring into proper state for use by some special or technical process, to manufacture, to make or compound": (see The Shorter Oxford Dictionary, 3rd edn., at page 1571). The word has a comprehensive meaning and takes in different processes involved in making a thing ready for use or consumption in a particular form. Butter is a product prepared by a process out of milk, whether the process involved is a simple or a complicated one, and, therefore, butter drawn from curd is a product prepared from milk. The word "exclusively", in our view, refers to the milk or cream of cow or buffalo. "Milk" has been defined as secretion obtained by milking of the udder of a healthy cow, buffalo, goat or sheep, whereas the definition of "butter" is confined exclusively to the milk of cow or buffalo. The word "exclusively", therefore, has no relation to other milk products. The plain meaning of the words used in the section indicates that butter prepared from milk or cream, by whatever process, is comprehended by the definition.

Learned counsel for the appellant contends that the rule being a part of a penal statute, it should be construed in favour of the accused. When it is said that all penal statutes are to be construed strictly it only means that the Court must see that the thing charged is an offence within the plain meaning of the words used and must not strain the words. To put it in other words, the rule of strict construction requires that the language of a statute should be so construed that no case shall be held to fall within it which does not come within the reasonable interpretation of the statute. It has also been held that in construing a penal statute it is a cardinal principle that in case of doubt the construction favourable to the subject should be preferred. But these rules do not in any way affect the fundamental principles of interpretation, namely, that the primary test is the language employed in the Act and when the words are clear and plain the Court is bound to accept the expressed intention of the legislature.

The latest view on the relevant rule of construction is found in "Maxwell on Interpretation of Statutes", 10th edn., at page 262, which reads,

> ". . . . . . it is now recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object."

Adverting to Acts against adulteration, the learned author quotes Day, J., in *Newby* v. *Sims*[1] as follows:

> "I cannot concur in the contention that because these Acts (against adulteration) impose penalties. therefore, their construction should, necessarily, be strict. I think that neither greater nor less strictness should be applied to those than to other statutes."

So judged, we have no doubt that the butter prepared out of curd falls within the plain meaning of the words in the said rule.

Reliance is placed by learned counsel for the appellant on the decision of Miabhoy, J., in *Narshinha Bhaskar* v. *State of Bombay*.[2] The decision is certainly in favour of the appellant. But a Full Bench of the same High Court in *Sadashiv* v. *P. V. Bhalarao*[3] overruled the said decision. In the latter decision Chainani, C.J., after considering the arguments observed at page 1804 thus:

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1. (1894) 63 L.J.M.C. 229.
2. I.L.R. (1958) Bom. 637.
3. I.L.R. (1959) Bom. 1800 (F.B.).

"The emphasis is, therefore, on the basic material from which butter is prepared and not on the process by which it is made. Dahi is prepared from milk by souring it. Butter prepared from Dahi can, therefore, be said to be butter prepared from milk itself, after it has undergone the process of souring. . . . . There is also a third method, which is used in some dairies and that is produce butter directly from milk itself. In all these three cases, the basic material from which butter is made is milk. Only the processes adopted for making it are different. In one case it is produced from milk directly. In the other two cases, cream and curd are first prepared and these are then churned to obtain butter. The preparation of cream or curd is only an intermediate process in the manufacture of butter from milk. Butter made from Dahi or curd, is therefore also butter made from milk.

We entirely agree with these observations.

Reliance is then placed upon a decision in *Hunt* v. *Richardson*[1] in support of the argument that if the standard prescribed was not maintained, the appellant did not commit any offence, as there was no adulteration of milk fat with other products. In the above case, by section 6 of the Sale of Food and Drugs Act, 1875, "no person shall sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded by the purchaser, under a penalty". By section 4 of the said Act, the Board of Agriculture were empowered to make regulations for determining what deficiency in any of the normal constituents of genuine milk should for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary was proved, that the milk was not genuine. In exercise of their power, the Board of Agriculture made a regulation prescribing that where a sample of milk contained less than 3 per cent. of milk fat it was to be presumed that the milk was not genuine by reason of the abstraction therefrom of milk fat or the addition thereto of water. A dealer in milk sold pure milk and the deficiency in the milk fat was not due to any abstraction from the milk or addition thereto, but because of the herbage on which the cows were fed. The Court, by a majority, held that no offence was committed by the dealer. The reason given for the decision is found at page 452 and it is,

"This section does not authorise the Board of Agriculture to define what is milk, or to fix a standard of the normal constituents below which an article shall be deemed not to be milk, and the regulation providing that where a sample of milk contains less than 3 per cent. of milk fat it shall be presumed, until the contrary is proved, not to be genuine of necessity implies that it may be proved to be genuine although it contains less than 3 per cent. of milk fat. It is to be observed that section 1 of the same Act of 1899, which deals with the importation of adulterated or impoverished milk, provides in sub-section 7 that for the purposes of that section milk shall be deemed to be adulterated or impoverished if it has been mixed with any other substance, or if any part of it has been abstracted so as in either case to affect injuriously its quality, substance, or nature. This, I think, confirms the view implied in the regulation that milk which has not been so treated although it be deficient in milk fat is none the less deemed to be milk for the purposes of section 6 of the Sale of Food and Drugs Act, 1875."

It is, therefore, obvious that under the English Act selling milk below a particular standard is not an offence. The gist of the offence is mixing with milk any other substance or abstracting any part from it so as to affect injuriously the quality, substance, or nature of the milk. The regulation prescribing that milk shall contain not less than 3 per cent. of milk fat raises only a rebuttable presumption, and the dealer, notwithstanding such deficiency, can prove that the milk has not been adulterated or impoverished within the meaning of the said Act. But in the Indian Act selling butter below the prescribed standard is deemed to be adulteration. If the standard is not maintained, the butter, by a fiction, becomes an adulterated food. A dealer in such butter cannot adduce evidence to prove that notwithstanding the deficiency in the standard, it is not adulterated.

The conclusion we have arrived at is not only supported by the plain words of the rule, but also carries out the clear intention of the Legislature. The Act was passed to make provisions for the prevention of adulteration of food. Butter is a favourite edible fat and is consumed in different ways by innumerable

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1. L.R. (1916) 2 K.B.D. 446.

persons in this country. As we have already pointed out, butter is prepared in the rural areas throughout this country by the indigenous process of churning soured milk, whereas only in a few cities butter is prepared directly from milk. The interpretation suggested by learned counsel for the appellant, if accepted, would make the rule a dead-letter, for all practical purposes, and the object of the Legislature would be defeated. In our view, the intention of the Lgislature has been clearly expressed in the rule.

We, therefore, hold that butter prepared from curd comes within the definition of "butter" in rule A. 11.05 of Appendix B to the Rules.

The second contention turns upon a question of fact. The High Court considered the entire evidence and accepting the evidence of the Food Inspector and the Health Officer, held that the bottle sent to the Public Analyst was the sample seized from the appellant. There are no permissible grounds for allowing the appellant to canvass the correctness of this finding. We, therefore, accept the finding.

The last contention is that the report of the Public Analyst is ambiguous and, therefore, the benefit of doubt should be given to the appellant. What is stated is that in the report it is stated that the butter contained 19.57 per cent. of moisture, 64.67 per cent. of milk fat and 18.32 per cent. of foreign fat, totalling 102.56 per cent., i.e., more than 100 per cent. It is, therefore, argued that the report on the face of it is incorrect and therefore should not be acted upon. There is an obvious fallacy underlying this argument. 18.32 per cent. of foreign fat is not a percentage in relation to the milk but only in reation to the fat. Out of the fat in the milk, the analyst says that 18.32 per cent. is foreign fat. In his own words, "The butter fat in the sample contains 18.32 per cent. foreign fat." If that be so, there is no mistake on the face of the report. The report clearly indicates that the butter sold by the appellant was below the standard prescribed under the rule. If so, it follows that the appellant is guilty of the offence with which he was charged.

The High Court sentenced the accused to undergo rigorous imprisonment for two months and also to pay a fine of Rs. 250. We agree with the High Court that the offence committed by the appellant is a serious one and that ordinarily the punishment should be deterrent. In most of the cases of this kind imprisonment would certainly be a suitable sentence. But in this case, there was a conflict of view even in the Bombay High Court as regards the question whether butter made from curd would be butter within the meaning of the rule. Indeed, it was brought to our notice that on April 16, 1960, the Central Government made another rule amending rule A. 11.05 by inserting the word "curd" in the definition of butter and the amended definition reads, "butter means the product prepared exclusively from milk, cream or curd of cow or buffalo........". This must have been made to clarify the position in view of the conflicting decisions. In the circumstances, we think that a sentence of fine would meet the ends of justice in the present case. We, therefore, set aside the sentence of two months' rigorous imprisonment and a fine of Rs. 250 and instead sentence the appellant to pay a fine of Rs. 500.

With this modification, the appeal is dismissed.

Sentence modified.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

Krishnamurthi Vasudeorao Deshpande and another .. *Appellants**

v.

Dhruwaraj .. *Respondent.*

Hindu Law—Adoption by widow of a coparcener—Effect—Estate taken by—Heirs of collateral—If divested.

If *A* is an owner of property possessing a title defeasible on adoption, not only that title but also the title of all persons claiming under him, will extinguish on the adoption.

The case of an adopted son's claiming to divest the heir of a collateral, who died before the adoption took place, of the property inherited from the collateral, is different from the case of his claiming the property which originally belonged to the adoptive father but had devolved on a collateral and after the death of the collateral, which took place before the adoption, devolved on a heir of the collateral. In the former case, the claim is to the property of the collateral, while in the latter case it is to property of the adoptive father, which, by force of circumstances had passed through the hands of a collateral.

The heir of a collateral succeeding to the sole surviving coparcener inherits the property absolutely but subject to defeasance, and the right in the property devolves on his heir, who must consequently take that property absolutely, but still subject to defeasance, as no better title could have been inherited so long as there was the possibility of the defeasance of the title by a widow of the family of the last surviving coparcener adding a member to the coparcenary by adopting a son to her deceased husband.

Ramchandra Hanmant Kulkarni v. *Balaji Datto Kulkarni*, I.L.R. (1955) Bom. 837 (F.B.), overruled.

Appeal from the Judgment and Decree, dated the 17th August, 1954, of the Bombay High Court, in Appeal No. 236 of 1950.

Purushottam Trikumdas, Senior Advocate, (*N. S. Anikhinda* and *M. S. K. Sastri*, Advocates, with him), for Appellants.

K. R. Bengeri and *A. G. Ratnaparkhi*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, on certificate under Article 133 of the Constitution, raises the question whether Dhruvraj, respondent, on his adoption, divests the defendants-appellants of the properties of his adoptive father and grandfather.

The facts giving rise to this question are as follows: Bandegouda, father of the respondent, died in 1882, pre-deceasing his father Narasappagouda, who died ater in 1892. Bandegouda left his widow Tungabai, who adopted Dhruvraj as her son on July 31, 1945.

Narasappagouda, on his death, left two daughters, Krishnabai and Shyamabai *alias* Chamavva. The two sisters succeeded to their father's property in equal shares. We are not now concerned with the share of Shyamabai, the respondent's suit with respect to it having been dismissed.

Krishnabai died on October 21, 1933. Her son Vasappa, succeeded her and died on February 20, 1934, leaving two sons, the appellants, Krishnamurti and Subbaji. Dhruvraj, respondent, instituted the suit for the recovery of the property from the two appellants alleging that the immovable properties formerly belonged to the ownership of and were under the vahiwat of the joint family of the above-mentioned Narasappagouda Patil and Bandegouda Patil. The suit also related to declaration that the plaintiff was entitled to the 'Patilki' rights in respect of the village Hombal, as the near relative of

* Civ. Appeal No. 499 of 1957. 5th May, 1961.

Narasappagouda. The appellants denied the respondent's rights to the properties contending that Krishnabai was the full owner of the properties and thus became a fresh stock of descent and that the appellants had inherited the properties from their father Vasappa to whom they had been alienated by Krishnabai in 1930. The High Court held that the alleged alienation by Krishnabai of her share to Vasappa in 1930 was not binding on the respondent as it amounted to a gift of immovable properties and was not made by a registered document. It further held that the respondent could divest the appellants of the properties which belonged to the respondent's adoptive grandfather and upheld the decree of the trial Court with respect to the property which had gone in the possession of Krishnabai on the death of her father.

This Court considered the rights of an adopted son with respect to the property of his adoptive father and of the collaterals, in *Shrinivas Krishnarao Kango* v. *Narayan Devji Kango and others.*[1] The principles to be deduced from what was said in this case may be summarised thus:

(*i*) An adopted son is held entitled to take in defeasance of the rights acquired prior to his adoption on the ground that in the eye of law his adopttion relates back, by a legal fiction, to the date of the death of his adoptive father, he being put in the position of a posthumous son.

(*ii*) As a preferential heir, an adopted son (*a*) divests his mother of the estate of his adoptive father; (*b*) divests his adoptive mother of the estate she gets as an heir of her son who died after the death of her husband.

(*iii*) A coparcenary continues to subsist so long as there is in existence a widow of a coparcener capable of bringing a son into existence by adoption; and if the widow made an adoption, the rights of the adopted son are the same as if he had been in existence at the time when his adoptive father died and that his title as coparcener prevails as against the title of any person claiming as heir to the last coparcener.

(*iv*) The principle of relation back applies only when the claim made by the adopted son relates to the estate of his adoptive father. The estate may be definite and ascertained, as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu family in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father which the adopted son is declared entitled to take as on the date of his death. This principle of relation back cannot be applied when the claim made by the adopted son relates not to the estate of his adoptive father but to that of a collateral. With reference to the claim with respect to the estate of a collateral, the governing principle is that inheritance can never be in abeyance, and that once it devolves on a person who is the nearest heir under the law, it is thereafter not liable to be divested. When succession to the properties of a person other than an adoptive father is involved, the principle applicable is not the rule of relation back but the rule that inheritance once vested could not be divested.

(*v*) The estate continues to be the estate of the adoptive father in whosoever's hands it may be, that is, whether in the hands of one who is the absolute owner or one who is a limited owner. Any one who inherits the estate of the adoptive father is his heir, irrespective of the inheritance having passed through a number of persons, each being the heir of the previous owner. This

1. (1954) S.C.J. 408 : (1954) 1 M.L.J. 630 : (1955) 1 S.C.R. 1.

Court considered the case of *Amarendra Mansingh* v. *Sanatan Singh*[1], which related to an impartible zamindari. The last of its holder was Raja Bibhudenra. He died on December 10, 1922, unmarried. A collateral, Banamalai, succeeded to the estate as the family custom excluded females from succeeding to the Raj. On December 18, 1922, Indumati, mother of Bibhudendra, adopted Amarendra to her husband, Brajendra. The question for determination, in that case, was whether Amarendra could divest Banamalai of the estate, and it was answered in the positive by the Judicial Committee. This Court said at page 19:

"The estate claimed was that of his adoptive father, Brajendra, and if the adoption was at all valid, it related back to the date of Brajendra's death, and enabled Amarendra to divest Banamalai."

The last holder of the estate was not Brajendra, the adoptive father, but Bibhudendra, who may be said to be the adoptive brother. The estate in his hands is described as the estate of Brajenda, the adoptive father. This Court said about the decision in this case:

"This decision might be taken at the most to be an authority for the position that when an adoption is made to *A*, the adopted son is entitled to recover the estate of *A* not merely when it has vested in his widow who makes the adoption but also in any other heir of his. It is no authority for the contention that he is entitled to recover the estate of *B* which had vested in his heir prior to his adoption to *A*."

Banamalai, heir of Bibhudendra, was considered to be the heir of Brajendra also.

In considering the case of *Anant Bhikappa Patil (Minor)* v. *Shankar Ramchandra Patil*[2], this Court observed at page 24:

"When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate. Thus, transferees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there could be no question of supporting the alienations on the ground of necessity or benefit."

It follows from these observations that if *A* is an owner of property possessing a title defeasible on adoption, not only that title but also the title of all persons claiming under him, will extinguish on the adoption.

In the present case, Krishnabai owned the property as full owner on the death of her father Narasappagouda, according to the Hindu law in the area in which the property in suit lay. But her title was defeasible on Tungabai, widow of Bandegouda, adopting a son to her husband. Vasappa and, after him, his sons, inherited this property of Krishnabai and thus the appellants claimed under Krishnabai. Their such claim is therefore defeasible on the adoption of a son by Tungabai. The fact that Krishnabai inherited the property of her father absolutely, does not affect this question of title being defeated on the adoption of a son by Tungabai. The character of the property does not change as suggested for the appellants, from coparcenary property to self-acquired property of Krishnabai so long as Tungabai, the widow of the family, exists, and is capable of adopting a son, who becomes a coparcener.

The case of an adopted son's claiming to divest the heir of a collateral, who died before the adoption took place, of the property inherited from the collateral, is different from the case of his claiming the property which originally

1. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 (P.C.).

2. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.).

belonged to the adoptive father but had devolved on a collateral and, after the death of the collateral, which took place before the adoption, devolved on a heir of the collateral. In the former case, the claim is to the property of the collateral, while in the latter case it is to the property of the adoptive father, which, by force of circumstances, had passed through the hands of a collateral.

We may now consider the Full Bench Case of the Bombay High Court, *Ramchandra Hanmant Kulkarni* v. *Balaji Datto Kulkarni*,[1] which overruled the judgment in the instant case. The question formulated for the decision of the Full Bench was:

" If on the death of a sole surviving coparcener his property has devolved upon his heir by inheritance and on his death it has vested in his own heir, would the subsequent adoption in the family of the ole surviving coparcener divest it from such heir ?"

The facts having a bearing on the decision of the question were as follows: Ramchandra and Balaji were brothers. Ramchandra died on October 10, 1903, and his widow Tarabai died two days later. Their son Hanmant had died during Ramchandra's lifetime, leaving behind him his widow Sitabai. The Watan property of Ramchandra devolved on Balaji after the death of Tarabai. On Balaji's death, it devolved on Datto, his son, who died in 1916. On his death, the property devolved upon his son Balaji. Sitabai, widow of Hanmant, adopted Ramchandra, the plaintiff, on January 21, 1945. Ramchandra thereafter instituted the suit against Balaji, son of Datta, and claimed that property which originally belonged to his adoptive family on the ground that he was entitled to recover it by virtue of his adoption which related back to the date of the death of his adoptive father.

Chagla, C.J., delivering the judgment of the Court in the above case said, in answer to the question formulated, that the subsequent adoption in the family of the sole surviving coparcener would not divest the property, assuming that Ramchandra, the adoptive grandfather, was the sole surviving coparcener of his own branch and that on his death the property devolved upon Datto and then upon Balaji. The learned Chief Justice, in considering the question on principles, said at page 851:

". . . . .and therefore it is well settled since the Privy Council decided, *Anant* v. *Shankar*[2] that Dattu inherited this property subject to defeasance, the defeasance coming into operation in the event of the potential mother Sitabai adopting a son into the family of Ramchandra. "

He said at page 852:

" Balaji has succeeded to the estate of his father Dattu and what the plaintiff is really claiming is not the property of Ramachandra but the property of Dattu which Balaji has inherited as his son . . . . . .Therefore, really, the plaintiff would have displaced Dattu as the preferential heir to his own grandfather. But it is difficult to understand how that principle can apply when we are dealing with property in the hands of Dattu's heir. It cannot be said that *qua* the estate of Dattu the plaintiff is an heir preferential to Balaji, and really what the plaintiff is claiming is to displace Balaji and to contend that he is the heir of Dattu. "

He therefore expressed the view:

" Therefore, in our opinion, once the principle is accepted, as indeed it must be accepted, that the property which Dattu inherited from Ramchandra was held by him absolutely as a full owner, then it is impossible to accede to the plaintiff's contention that Balaji inherited to that property subject to certain limitations. The possibility of there being a defeasance only continued so long as Dattu was alive. When he died he left his property, which was his absolute property, to his heir and there is no reason in principle why that provision with regard to defeasance should continue after the property had been inherited by Balaji as the heir of Dattu. "

We may say at once that this conclusion goes against what had been said by this Court in *Shrinivas Krishnarao Kango's case*[3]

1. I.L.R. (1955) Bom. 837 (F.B.).
2. (1943) 2 M.L.J. 599 : L.R. 70 I.A. 232 (P.C.).
3. (1954) S.C.J. 408 : (1954) 1 M.L.J. 630 : (1955) 1 S.C.R. 1.

It has been overlooked that the heir of a collateral succeeding to the sole surviving coparcener inherits the property absolutely, but subject to defeasance, and that the right in the property devolves on his heir, who must consequently take that property absolutely, but still subject to defeasance, as no better title could have been inherited so long as there was the possibility of the defeasance of the absolute title by a widow of the family of the last surviving coparcener adding a member to the coparcenery by adopting a son to her deceased husband, and in overlooking what was stated in this connection by this Court in *Shrinivas Krishnarao Kango's case*,[1] though not as a decision, but as a reasoning to come to a decision in that case.

We are therefore of opinion that this appeal should fail and accordingly dismiss it with costs of this appeal.

Appeal dismissed.

THE SUPREME COURT OF INDIA

(Criminal Appellate Jurisdiction.)

PRESENT :—MR. JUSTICE K. SUBBA RAO AND MR. JUSTICE RAGHUBAR DAYAL.

L. N. Mukherjee .. *Appellant**

v.

The State of Madras .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 239 and 177——Offences in pursuance of conspiracy (outside jurisdiction) committed within jurisdiction—Court having jurisdiction to try can try the offence of conspiracy committed outside jurisdiction.

The Court having jurisdiction to try the offences committed in pursuance of the conspiracy, can try the offence of conspiracy, even if it was committed outside its jurisdiction.

Appeal by Special Leave from the Judgment and Order[2], dated the 14th April, 1960, of the Madras High Court in Crl. Misc. Petition No. 246 of 1960.

D. N. Mukherjee, Advocate, for Appellant.

M. S. K. Sastri and *T. M. Sen*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, is against the Order of the Madras High Court dismissing the application for quashing the commitment of the case against the appellant, to the Court of Sessions, for trial of offences of criminal conspiracy to cheat under section 120-B read with section 420, Indian Penal Code, and for the offence of forgery committed in pursuance of that conspiracy. The criminal conspiracy is alleged to have been committed at Calcutta. The other offences in pursuance of the conspiracy are alleged to have been committed within the jurisdiction of the Court of Session at Madras. The quashing of the commitment was sought on the ground that the Courts at Madras had no jurisdiction to try the offence of conspiracy. The High Court did not accept the contention and dismissed the application.

The sole question for consideration in this appeal is whether the offence of conspiracy alleged to have been committed at Calcutta can be tried by the Court of Session at Madras.

We have held this day, in *Purushottamdas Dalmia* v. *The State of West Bengal*[3], that the Court having jurisdiction to try the offence of criminal conspiracy can also try offences committed in pursuance of that conspiracy even if those offences were committed outside the jurisdiction of that Court, as the provisions of section 239, Criminal Procedure Code, are not controlled by the provisions of section 177,

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1. (1954) S.C.J. 408 : (1954) 1 M.L.J. 630 : (1955) 1 S.C.R. 1.

* Crl. Appeal No. 119 of 1960. 19th April, 1961.

2. (1960) 2 M.L.J. 340 : 1960 M.L.J. (Crl.) 724.

3. Crl. Appeal No. 51 of 1959 since reported in (1961) 2 S.C.J. 563.

Criminal Procedure Code, which do not create an absolute prohibition against the trial of offences by a Court other than the one within whose jurisdiction the offence is committed. On a parity of reasoning, the Court having jurisdiction to try the offences committed in pursuance of the conspiracy, can try the offence of conspiracy even if it was committed outside its jurisdiction. We therefore hold that the order under appeal is correct and, accordingly, dismiss this appeal.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice,* K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Hira Lal Patni .. *Appellant**

v.

Sri Kali Nath .. *Respondent.*

Practice—Jurisdiction—Waiver of objection to—Effect—Plaint filed after obtaining leave under Clause 12 of the Letters Patent (Bombay) on Original Side of Bombay High Court—Defendant agreeing to arbitration—Award and decree passed on it—Jurisdiction of Bombay High Court—If can be questioned in execution—Civil Procedure Code (V of 1908), sections 20 and 47—Scope.

Where a plaint had been filed after obtaining the necessary leave of the Bombay High Court (Original Side) whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. When the plaintiff in the instant case obtained the leave of the Bombay High Court on the original side, under Clause 12 of the Letters Patent the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through Court, he would be deemed to have waived his objection to the territorial jurisdiction of the Court, raised by him in his written statement. An objection to local jurisdiction can be waived and the defendant is estoppel from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally estopped from challenging the authority of the arbitrator to render the award.

Appeal from the Judgment and Decree dated the 27th January, 1955, of the Allahabad High Court, in Execution First Appeal No. 137 of 1954.

A. V. Viswanatha Sastri, Senior Advocate (*E. Udayarathnam* and *S. S. Shukla,* Advocates, with him), for Appellant.

Vidya Sagar, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sinha, C.J.—This appeal, on a certificate by the High Court of Judicature at Allahabad, arises in execution proceedings taken by the decree-holder—respondent, in the following circumstances. The appellant wished to acquire shares in certain mills, popularly known as 'John Mills', at Agra. He engaged the services of the respondent to negotiate the deal on certain terms. The bargain was concluded, and the appellant, together with another person, purchased the entire interest of one Major A. U. John by an indenture of sale, dated July 10, 1946. The respondent instituted a suit, being suit No. 3718 of 1947, on the Original Side of the High Court of Judicature at Bombay for recovery of his commission, amounting to one *lakh* of rupees, in respect of the transaction aforesaid.

The suit was eventually referred to the arbitration of one Mr. W. E. Pereira, administrator of the estate of the aforesaid Major A. U. John, deceased. One

* Civil Appeal No. 237 of 1958. 4th May, 1961.

of the defences taken by the appellant, as defendant in the action, was that the suit filed in the Bombay High Court, as aforesaid, after obtaining leave of that Court under Clause (12) of the Letters Patent, was outside the territorial jurisdiction of the Bombay High Court on the Original Side, inasmuch as the entire cause of action, if any, had arisen at Agra. The arbitrator gave an award in favour of the respondent to the extent of decreeing his claim for only seventy five thousand rupees as commission, with interest at 6 per cent. per annum *pendente lite*. Proceedings were taken in the High Court of Bombay for setting aside the award on certain grounds, not necessary to be stated here. The Bombay High Court found that there was no defect in the award and that there was no legal misconduct on the part of the arbitrator. The High Court further held that the petition was frivolous, and dismissed it with costs. The appellant preferred an appeal which was dismissed by a Division Bench of the High Court of Bombay on January 21, 1952. The award was, thus, incorporated in a decree of the High Court. That decree was transferred to the Court of the District Judge, Agra, for execution. On February 5, 1952, the execution proceedings were instituted by the decree-holder in the Court of the Civil Judge, Agra, to realise the sum of one *lakh* ten thousand rupees, approximately, on the basis of the decree passed as aforesaid by the Bombay High Court.

The appellant, as judgment-debtor, put in an objection under sections 47 and 151 of the Code of Civil Procedure, objecting to the execution of the decree on a number of grounds, of which it is only necessary to notice the one challenging the jurisdiction of the High Court to entertain the suit and to make the award a decree of Court. It was contended that the Bombay High Court had no jurisdiction to entertain the suit as no part of the cause of action ever arose within the territorial jurisdiction of that Court, and that, therefore, all the proceedings following thereupon were wholly without jurisdiction. The learned Execution Judge, by his Judgment and Order, dated April 3, 1954, dismissed the objection petition with costs. The appellant then preferred an appeal to the High Court of judicature at Allahabad against the aforesaid Judgment and Order of the Executing Court. The appeal, being Execution First Appeal No. 137 of 1954, was ultimately dismissed by a Division Bench of the Allahabad High Court, by its judgment, dated January 27, 1955. The judgment-debtor-appellant moved the High Court and obtained the necessary certificate that the case was a fit one for appeal to this Court; and that is how the matter is before us.

The only ground on which the decision of the High Court is challenged is that the suit instituted on the Original Side of the Bombay High Court was wholly incompetent for want of territorial jurisdiction and that, therefore, the award that followed on the reference between the parties and the decree of Court, under execution, were all null and void. Strong reliance was placed upon the decision of the Privy Council in the case of *Ledgard* v. *Bull*.[1] In our opinion, there is no substance in this contention. There was no inherent lack of jurisdiction in the Bombay High Court where the suit was instituted by the plaintiff-decree-holder. The plaint had been filed after obtaining the necessary leave of the High Court under Clause 12 of the Letters Patent. Whether the leave obtained had been rightly obtained or wrongly obtained is not a matter which can be agitated at the execution stage. The validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly

1. L.R. 13 I.A. 134 (P.C.).

foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it. But in the instant case there was no such inherent lack of jurisdiction. The decision of the Privy Council in the case of *Ledgard* v. *Bull*,[1] is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was laid down by the Privy Council that as the Court in which the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was null and void because consent of parties could not operate to confer jurisdiction on a Court which was incompetent to try the suit. That decision has no relevance to a case like the present where there could be no question of inherent lack of jurisdiction in the sense that the Bombay High Court was incompetent to try a suit of that kind. The objection to its territorial jurisdiction is one which does not go to the competence of the Court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the Original Side, under Clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through Court, he would be deemed to have waived his objection to the territorial jurisdiction of the Court, raised by him in his written statement. It is well-settled that the objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a Court can be waived and this principle has been given a statutory recognition by enactments like section 21 of the Code of Civil Procedure. Having consented to have the controversy between the parties resolved by reference to arbitration through Court, the defendant deprived himself of the right to question the authority of the Court to refer the matter to arbitration or of the arbitrator to render the award. It is claer, therefore, that the defendant is estopped from challenging the jurisdiction of the Bombay High Court to entertain the suit and to make the reference to the arbitrator. He is equally estopped from challenging the authority of the arbitrator to render the award. In our opinion, this conclusion is sufficient to dispose of the appeal. It is not, therefore, necessary to determine the other points in controversy, including the question whether the Decrees and Orders Validating Act, 1936 (Act V of 1936) had the effect of validating what otherwise may have been invalid.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

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1. L.R. 13 I.A. 134 (P.C.).

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

The River Steam Navigation Co., Ltd. and another .. *Appellants**

v.

Shyam Sundar Tea Co., Ltd. .. *Respondent.*

Carriers Act (III of 1865)—" Common carrier "—Test—Every carrier if common carrier.

The question whether the carrier was a common carrier or a private carrier has to be decided on the ascertainment of what he publicly professes. This profession may be by public notice or by actual indiscriminate carrying of goods. The profession to carry goods indiscriminately may be limited to particular goods or to particular routes or even as to two or more specified points. The mere fact that they are engaged in the transport of goods from certain places on their Steamer Service to other places does not necessarily justify the conclusion that whatever carriage they may undertake elsewhere is also done as a common carrier. Where boats were supplied on requisition, without picking and choosing for carrying consignors tea from the gardens on the feeder routes for loading in Steamers on the main Steamer routes, that would be sufficient public profession to act as a common carrier. The fact that there was no fixed rate for carriage on the feeder routes is immeterial in deciding whether the carrier was a common carrier. The fact that such carriage was made without profit is also immeterial.

Appeal from the Judgment and Decree dated the 15th June, 1954, of the Assam High Court in First Appeal No. 23 of 1950.

D. N. Mukherjee, Advocate, for Appellants.

B. Sen, Senior Advocate (*P. K. Chatterjee* and *P. K. Bose,* Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—This appeal is from the judgment and decree of the High Court of Judicature in Assam affirming the Judgment and Decree made by the Subordinate Judge of Upper Assam Districts, in a suit brought by the Respondent Shyam Sundar Tea Co., Ltd., against the present appellants. The appellant companies are joint owners of Steamer service between Dibrugrah and Calcutta. The main service is along the Brahmaputra River. Desang is one of the tributaries of the Brahmaputra and meets the main stream at Desangmukh Ghat. The plaintiff's case in the plaint was that the defendant companies as common carriers received goods at Dillibari Ghat which is situated on the Desang about 70 miles up-stream from Desangmukh Ghat for carriage "therefrom by boats to Desangmukh Ghat and then by their steamers to different stations on payment of freight." It is further the plaintiff's case that on September 10, 1946, the plaintiff company delivered 120 chests of tea to the defendants at Dillibari Ghat for carrying therefrom and delivery of the same at Kidderpore in Calcutta. The boat carrying these tea chests sank; the tea chests were lost and could not be salvaged. The accident was, according to the plaintiff, due to the negligence on the part of the defendant companies' agents and servants. On this ground of negligence as also on the ground that the companies as common carriers were liable to make good the loss whether or not there was negligence, the plaintiff claimed the sum of Rs. 16,224-12-0 as compensation for the loss.

The defendants raised a four-fold defence. The first contention was that there was no delivery to the defendants at all at Dillibari Ghat and the defendants did not undertake any carriage of the goods from Dillibari Ghat. Secondly, it was said that the sinking of the boat was not due to any negli-

* Civil Appeal No. 404 of 1957. 5th May, 1961.

gence on the part of the defendants' servants. The third contention was that the defendants were not a common carrier in respect of carriage of goods from Dillibari Ghat to Desang. Lastly it was pleaded that in any case the conditions of the Forwarding Note which was executed by the plaintiff company completely absolved the defendants from all liability.

The Trial Court held on a consideration of the evidence that the goods were delivered by the plaintiff to the defendants at Dillibari Ghat for carriage from there to Kidderpore, Calcutta. It also held that the sinking of the boat was due to negligence on the part of the defendants' servants. Accordingly, without coming to a clear conclusion whether the defendants were common carriers or not in respect of this contract of carriage the Trial Court gave the plaintiff a decree for the sum as claimed.

On appeal the High Court of Assam affirmed this decree, though not for quite the same reasons. The High Court agreed with the Trial Court's conclusion that there was delivery of the goods to the defendants by the plaintiff at Dillibari Ghat for carriage therefrom. On the question whether the sinking of the boat was due to the negligence of the defendants' servants the learned Judges of the High Court did not however accept the Trial Court's view. Their opinion, it appears, was that the plaintiff had not been able to establish the case of negligence on the part of the defendant's servants. The High Court however came to the conclusion that the defendants undertook this carriage from Dillibari Ghat in their capacity as common carrier and so the question whether there was negligence or not was irrelevant. The High Court also found that the terms and conditions of the Forwarding Note did not in any way absolve the defendants from liability. Accordingly, the High Court affirmed the decree made by the Trial Court.

It may be mentioned that though on both the points, *viz.*, whether the delivery of the goods at Dillibari was to the defendants and whether the defendants were, for such carrying from Dillibari, common carrier, one of the learned Judges, Mr. Justice Ram Labhaya, appears to have been hesitant in coming to his conclusion but ultimately on both these points he agreed with the Chief Justice and the agreed conclusions of both the learned Judges were, as we have mentioned above.

The High Court gave a certificate under Article 133 (1) (*c*) of the Constitution and on that certificate the present appeal has been brought.

On behalf of the appellants Mr. Mukherjee has tried to persuade us to examine the findings of the Courts below that the plaintiff delivered the tea chests in question to the defendants at Dillibari Ghat. He tried to show that it was Macneill and Company who used to run this boat service from Dillibari to Desangmukh and that the defendants had nothing to do with this business. Apart from the fact that such a case that Macneill and Company used to carry on an independent boat service business to Desangmukh was not made in the plaint, we are satisfied that there is nothing that would justify us to depart from the well-established practice of this Court not to interfere with concurrent findings of facts, of the Trial Court and the first Court of appeal. We may however indicate that having been taken through the evidence we have no hesitation in stating our agreement with that finding, *viz.*, that the plaintiff delivered the tea chests in question to the defendants at Dillibari Ghat for carriage therefrom. We see no reason also to interfere with the High Court's findings that the plaintiff has not been able to establish its case of any negligence on the part of the defendants' agents.

This brings us to the main question in controversy, *viz.*, whether the appellants were common carriers of goods between Dillibari Ghat and Calcutta. The appellants admit that they are common carriers between Dasangmukh Station and all other places on its steamer routes. They contend however that that does not make them a common carrier between Dillibari Ghat or other places not in its steamer service route, to any place on the steamer service route. The respondent's case, on the other hand, is that once it is established that the defendants are common carriers within the meaning of the definition in the Carriers Act, they must be held in law to be a common carrier whenever they undertake carriage of goods, unless with respect to the particular carriage they show definitely that they did not act as common carriers.

The Carriers Act, 1865 (Act III of 1865) defines "common carrier" in these words:—

"'Common carrier' denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately."

This definition is based on the English common law as regards the common carriers. The common law in England developed from quite early times to make the profession of common carriers a kind of public service; or as stated by Lord Holt in an early case "a public trust". (Vide *Lane* v. *Cotton*).[1] It is where such a public trust has been undertaken as distinct from a mere private contract that a carrier ceases to be a private carrier but becomes a public carrier or as English law calls "a common carrier." Explaining the distinction between a mere carrier and a common carrier, Alderson B, said in *Ingate and another* v. *Christis*[2]:—

"Everybody who undertakes to carry for anyone who asks him, is a common carrier. The criterion is, whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for everyone who asks him, he is a common carrier; but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract."

The question in any particular case whether the carrier was a common carrier or a private carrier has therefore to be decided on the ascertainment of what he publicly professes. This profession, it need hardly be mentioned, may be by public notice or by actual indiscriminate carrying of goods. It is also clear that the profession to carry goods indiscriminately may be limited to particular goods or to particular routes or even as to two or more specified points. In *Johnson* v. *Midland Rly., Co.*[3] the question arose whether the Railway Company were as common carriers bound to carry coal from Melton Mowbray to Oakham Parke B, with whom Alderson B, Rolfe B, and Platt B, agreed stated the law thus:—

"A person may profess to carry a particular description of goods only, for instance, cattle or dry goods, in which case he could not be compelled to carry any other kind of goods; or he may limit his obligation to carrying from one place to another, as from Manchester to London, and then he would not be bound to carry to or from intermediate places."

Turning to the facts of the case before him the learned Baron stated:—

"Now, if the defendants stand in the situation of carriers at common law, they are not liable. because it does not appear in evidence that there ever had been a public profession by them that they would carry coals from Melton Mowbray to Oakham."

Ultimately the learned Judge recorded the conclusion thus:—

"I think that the circumstances of their having undertaken to be carriers does not bind them to carry from or to each place on the line, or every description of goods."

1. 12 Mod. 474.
2. (1850) 3 Car & K. 61.
3. (1849) 4 Ex. 367.

This is good authority for the appellants' contention that the mere fact that they are engaged in the transport of goods from certain places on their steamer service to other places does not necessarily justify the conclusion that whatever carriage they may undertake elsewhere is also done as a common carrier. It is therefore necessary to examine the nature of the public profession made by the appellants with regard to the carriage of goods from Dillibari Ghat. It is true, as pointed out by the appellants' counsel that there is no public notice, as there is in respect of places on the steamer-service route, with regard to carriage from Dillibari Ghat. It is legitimate however to consider in this connection the usual conduct of the appellant companies in connection with carriage from Dillibari Ghat and other surrounding circumstances. It has to be noticed that tea gardens which supply the bulk of the companies' cargo traffic for its despatch steamers find it convenient and economical to bring their goods to the nearest point on some river and to enter into contracts of carriage of goods from these points to the steamer service routes. It appears clear from the evidence adduced in this case that for such carriage the tea gardens make requests to the appellants to arrange for carriage to the steamer station and the companies invariably comply with such requests.

Their own witness, the Joint Agent at Dibrugrah, has said in this connection "We always try to give facilities to the interior tea gardens and to all customers whenever they require any help." He has not said a single word as to requests of any customers for arrangements of carriage from Dillibari Ghat having been refused. Indeed, when one remembers that it is by getting the custom from these interior tea gardens, not all of which are situated on or near the main stream of the Brahmputra that the companies are able to get sufficient cargo for their steamers, it was only natural that they would accept goods for carriage from places away from the main stream as indiscriminately as they do for carriage from stations on the main steamer route.

The defendants' witness Mohammad Abdulla who is their Ghat Supervisor at Desangmukh has stated that "the Steamer Company bears expenses of the clearance of the rivers to make them navigable." Such conduct is consistent only with the case that the companies are anxious to receive whatever cargo they get for carriage from places on the river Desang and other tributaries to stations on the main steamer route for further carriage on the steamer route. The service on these tributaries can therefore be reasonably described as a "feeder srvice" for the main route and the admitted public profession for indiscriminate carriage of the goods of every person on the main route cannot but attach to the service on these "feeder routes" also.

Against all this, Mr. Mukherjee pressed for our consideration three circumstances: (*i*) that the rate for carriage from Dillibari was not a fixed rate; (*ii*) that there was no regular service but boats were supplied only on requisition and (*iii*) that the carriage was made without profit.

Nothing turns on the third fact,—assuming that it has been established—that carriage from Dillibari to Desang is made without profits. If this is actually the case it is obvious that the defendants deliberately do this as a part of their business so as to attract good business on the main steamer service route where they hope to make sufficient profits to make up for the loss in feeder service.

The circumstance that there was no regular service but boats were supplied only on requisition is also wholly irrelevant for ascertaining whether there was a public profession to carry indiscriminately. Even if there was a regular

service, there might not be a profession to carry indiscriminately; whereas even if there was such a profession it would not necessarily happen that regular service should be maintained. If, as the evidence appears to establish, the companies were ready to supply boats whenever requested, without picking and choosing, that would be sufficient public profession to act as a common carrier.

Nor is the fact that there was no fixed rate for carriage of goods from Dillibari to Desangmukh of any assistance to the appellants' contention that they were not common carriers, for the law does not require that a common carrier must have one and the same rate for all goods. The law was stated thus by Blackburn, J., in *G. W. Ry. Co.* v. *Sutton* [1]:

> "There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge any more than was reasonable."

"The requirement of equality of charges," as pointed out by Prof. Otto Kahn-Fre-und in the Law of Carriage by Inland Transport (3rd Edition) at page 190,

> "in so far as it existed, was entirely the creation of statute while the common law regards inquality as nothing more than possible evidence of unreasonableness."

That there was no fixed charge for carriage from Dillibari cannot therefore be any reason to think the appellants were not common carriers in respect of carriage from Dillibari.

The next argument of Mr. Mukherjee was almost an argument of despair. He points out that there was a Forwarding Note (Exhibit B) executed by the plaintiff in respect of the journey from Desangmukh to Calcutta and there was a special contract there limiting the carriers' liability. If the appellants were really common carriers in respect of the carriage from Dillibari, is it conceivable, he asks, that there would not be a similar Forwarding Note covering the carriage from Dillibari to Desangmukh? That however is a totally wrong approach to the problem. A common carrier may restrict his liability by special contract. But the absence of a special contract cannot show that he is not a common carrier. The fact that the appellants did not take care to make a special contract in respect of carriage from Dillibari is therefore wholly irrelevant.

On a consideration of the entire evidence therefore we are of opinion that the appellants did profe s by their conduct, even if not by any public notice, that they would carry goods indiscriminately for all those who ask for such carriage from Dillibari to various places on their main steamer route. They were thus common carriers in respect of the carriage of the plaintiff's goods from Dillibari.

A last contention was raised, again, on the Forwarding Note. It was urged that in any case this should be interpreted as covering the carriage from Dillibari also. In terms the Forwarding Note was limited to the contract of carriage as from Desangmukh to Calcutta. By no method of construction of the document can it be extended to the journey from Dillibari.

All the contentions raised in the appeal therefore fail. The appeal is accordingly dismissed with costs.

Appeal dismissed.

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1. (1869) L.R. 4 H.L. 226 at 237.

SUPREME COURT OF INDIA.

(CIVIL APPELLATE JURISDICTION).

PRESENT :—P.B. GAJENDRAGADKAR, A. K. SARKAR, K. SUBBA RAO, K. N. WANCHOO AND J. R. MUDHOLKAR, JJ.

Bhau Ram .. *Appellant**

v.

Baij Nath Singh and others .. *Respondents.*

Advocate-General, Madhya Pradesh and Advocate-General, Rajasthan .. *Interveners.*

Practice—Appeal—Special Leave to appeal—Subsequent withdrawal of the price of pre-emption deposited in the Court below—If precludes the party from proceeding with the appeal—The doctrine of approbate and reprobat—Applicability.

By Majority : (*Sarkar, J.* holding contra) : A statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree and there is no justification for extending the rule in *Tinkler* v. *Hilder*, 154 E. R. 1176 to cases like the present. It must be limited only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the *lis* under an order to which benefit he could not have been entitled except for the order. Here the appellant, by withdrawing the pre-emption price has not taken a benefit *de hors* the merits. Besides, this is not a case where restitution is impossible or inequitable. Further the existence of a choice between two rights is also one of the condistions necessary for the applicability of the doctrine of approbate and reprobate. In the instant case there as no such choice before the appellant, and, terhefore, his act in withdrawing the pre-emption pollce cannnot preclude him from continuing the appeal.

Per *Sarkar, J.* : By withdrawing the money the appellant has of his free choice, adopted the decree and must therefore be precluded from challenging its validity. He had no right to the money excepting such as the decree gave him. Therefore, by withdrawing the money, he adopted the correctness of the decree and cannot now say it is incorrect.

The fact that the appellant had withdrawn the money after he had obtained leave of the Court makes no difference to the applicability of the principle.

Appeal by Special Leave from the Judgment and Decree dated the 24th March, 1952, of the Judicial Commissioner's Court, Vindhya Pradesh, in First Appeal No. 16 of 1952.

L.K. Jha, Senior Advocate (*A. D. Mathur* and *R. Patnaik*, Advocates with him), for Appellant.

N.C. Chatterjee, Senior Advocate (*D.N. Mukherjee*, Advocate, with him), for Respondent No. 1.

I.N. Shroff, Advocate, for the Advocate-General, Madhya Pradesh, *G.C. Kasliwal*, Advocate- General, Rajasthan (*D. Gupta*, Advocate, with him), for Interveners.

The Court delivered the following Judgments.

Mudholkar, J. (for the Majority).—This is an appeal by Special Leave and the main point involved in it is whether the Rewa State Pre-emption Act, 1949, is unconstitutional on the ground that it places an unreasonable restriction upon the right to acquire property enumerated in clause (1) of Article 19 of the Constitution. But before we hear arguments upon this point it is necessary to dispose of the preliminary objection raised on behalf of the plaintiff-respondent No. 1 by Mr. N. C. Chatterjee to the effect that the defendant-appellant is precluded from proceeding with the appeal because subsequent to the grant of Special Leave to appeal to him he withdrew the price of pre-emption which was deposited by the respondent No. 1 in the Court below. He contends that by withdrawing the pre-emption price the appellant must be deemed to have accepted the decree which alone entitled him to the amount and that, therefore, he cannot be heard to say

*Civil Appeal No. 270 of 1955. 16th March, 1961.

that the decree is erroneous. In short, Mr. Chatterjee relies upon the doctrine that a person cannot be allowed to approbate and reprobate.

In support of his contention, learned counsel has relied upon the well-known case of *Tinkler* v. *Hilder*[1], and other cases which follow that decision or which proceed on the same reason as that in *Tinkler's* case[1]. Those decisions are : *Banku Chandra Bose* v. *Marium Begum*[2], *Ranendramohan Tagore* v. *Keshabchanda*[3] *Mani Ram* v. *Beharidas*[4] ; *S.K. Veeraswami Pillai* v. *Kalyanasundaram Mudaliar and others*[5] ; *Venkatarayudu* v. *Chinna*[6] and *Pearce* v. *Chaplin*[7].

The two English decisions just referred to and some of the Indian decisions were considered in *Venkatarayudu* v. *Chinna*[6]. Dealing with them Venkatasubba Rao, J., observed as follows :

> " What is the principle underlying these decisions ? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another. For instance, if the Court directs that the suit shall be restored on the plaintiff paying the costs of the opposing party, there is no intention to benefit the latter, except on the terms mentioned in the order itself. If the party receives the costs, his act is tantamount to adopting the order...According to *Halsbury* this rule is an application of the doctrine ' that a person may not approbate and reprobate ' (13 *Halsbury*, paragraph 508)...In other words to allow a party,who takes a benefit under such an order, to complain against it, would be to permit a breach of faith ".

The view taken in the other cases proceeds on similar reasoning. But what has to be noted is that in all these cases the benefit conferred by the order was something apart from the merits of the claim involved in these cases. What we are called upon to decide is whether the appellant by withdrawing the pre-emption price can be said to have adopted the decree from which he had already prefered an appeal. The appellant did not seek to execute the decree, and indeed the decree did not confer a right upon him to take out execution at all. The decree merely conferred a right upon the plaintiff-respondent No. 1 to deposit the price of pre-emption and upon his doing so, entitled him to be substituted in the sale deed in place of the vendee. The act of the appellant in withdrawing the pre-emption price after it was deposited by the respondent No. 1 cannot clearly amount to an adoption by him of the decree which he had specifically challenged in his appeal.

Upon the principles underlying the aforesaid decisions a person who takes benefit under an order *de hors* the claim on merit cannot repudiate that part of the order which is detrimental to him because, the order is to take effect in its entirety. How can it be said that a vendee in a pre-emption suit against whom a decree is passed takes any " benefit " thereunder ? No doubt, he has a right to be paid the pre-emption price before the pre-emption decree becomes effective but the price of pre-emption cannot be characterised as a benefit under the decree. It is only in the nature of compensation to the vendee for the loss of his property. For this reason the principle of the aforesaid decision would not apply to such a decree.

A question similar to the one before us had arisen in the Punjab in several cases and in particular in the judgment of Lal Chand, J., in *Sundara Das* v. *Dhanpat Rai*[8]. What the Court held there is that the right of appeal is not forfeited by the vendee merely because he has withdrawn the money deposited by the pre-emptor in whose favour a decree for pre-emption has been passed. No reference is made by the learned Judge to the decisions in *Tinkler's case*[1] and in *Pearce's case*[7] and, therefore, this decision and other similar decisions are of little assistance in considering the argument advanced by Mr. Chatterjee.

It seems to us, however, that in the absence of some statutory provision or of a well-recognised principle of equity, no one can be deprived of his legal rights

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1. 154 E. R. 1176.
2. 21 C.W.N. 232.
3. I.L.R. 61 Cal. 433.
4. A.I.R. 1955 Raj. 145.
5. A.I.R. 1927 Mad. 1009.
6. 58 M.L.J. 137 : A.I.R. 1930 Mad. 268.
7. 115 E. R. 1483.
8. 16 P. R. 74.

including a statutory right of appeal. The phrase "approbate and reprobate" is borrowed from Scots Law where it is used to express the principle embodied in the English doctrine of election, namely, that no party can accept and reject the same instrument (per Scrutton L.J. in *Verschures Creameries Ltd.* v. *Hull and Netherlands Steamship Co. Ltd*[1]. The House of Lords further pointed out in *Lissenden* v. *C.A.V. Bosch, Ltd.*[2] that the equitable doctrine of election applies only when an interest is conferred as an act of bounty by some instrument. In that case they held that the withdrawal by a workman of the compensation money deposited by the employer could not take away the stautory right of appeal conferred upon him by the Workmen's Compensation Act. Lord Maugham, after pointing out the limitations of the doctrine of approbate and reprobate observed towards the conclusion of his speech :

> "It certainly cannot be suggested that the receipt of the sum tendered in any way injured the respondents. Neither estoppel nor release in the ordinary sense was suggested. Nothing was less served than the principles either of equity or of justice." (pages 421-422).

Lord Wright agreed with Lord Maugham and Lord Atkin and declined to apply the "formula" to the appeal before the House because there was no question of the appellant having alternative or mutually exercisable right to choose from.

No doubt, as pointed out by Lord Atkin, that in a conceivable case the receipt of a remedy under a judgment may be made in such circumstances as to preclude an appeal. But he did not think it necessary to discuss in what circumstances the statutory right of appeal may be lost and added :

> "I only venture to say that when such cases have to be considered it may be found difficult to apply this doctrine of election to cases where the only right in existence is that determined by the judgment : and the only conflicting right is the statutory right to seek to set aside or amend that judgment : and that the true solution may be found in the words of Lord Blanesburgh in *Moore* v. *Cunard Steamship Co.*"[3]

According to Lord Blanesburgh when an order appealed against and later, set aside, has been acted upon in the meantime "any mischief so done is undone" by an appropriate order. Thus the only question which has to be considered is whether the party appealing has so conducted himself as to make restitution impossible or inequitable. Thus, according to the House of Lords it is to cases in which a party has so conducted himself as to make restitution impossible or inequitable that the principle on which the decision in *Tinkler's case*[4] is based, may apply. Referring to this case and three other similar cases Lord Atkin observed :

> "In any case they form a very flimsy foundation for such a wide-reaching principle applicable to all appeals as was asserted in this case : and if they did lead to that result should not be followed (pages 428-429).

The *Lissenden case*[2], has thus in clear terms indicated what the limitations of the Scots doctrine are. If, therefore, what was laid down in this case is the Common law of England according to its highest judicial tribunal, it is only that law which the Courts in this country may apply on the principles of natural justice and not what was supposed to be the Common law in certain earlier decisions.

It seems to us that a statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree and there is no justification for extending the rule in *Tinkler's case*[4], to cases like the present. In our judgment it must be limited only to those cases where a person has elected to take a benefit otherwise than on the merits of the claim in the *lis* under an order to which benefit he could not have been entitled except for the order. Here the appellant, by withdrawing the pre-emption price has not taken a benefit *de hors* the merits. Besides, this is not a case where restitution is impossible or inequitable. Further, it seems to us that the existence of a choice between two rights is also one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. In the case before us

1. L.R. (1921) 2 K.B. 608.
2. L.R. (1940) A.C. 412.
3. 28 B.W.C.C. 162.
4. 154 E.R. 1176.

there was no such choice before the appellant, and, therefore, his act in withdrawing the pre-emption price cannot preclude him from continuing his appeal. We, therefore, overrule the preliminary objection. The appeal will now be set down for hearing on merits. The costs of this hearing will be costs in the appeal.

Sarkar, J.—It seems to me that the objection to the maintainability of this appeal must succeed. The appellant having taken the benefit of the decree cannot now challenge its validity.

The decree was passed in a suit for pre-emption brought in May, 1951, by the respondent Baijnath, whom I will call the respondent, against the appellant, the purchaser of certain property and the vendors, the other respondents who have not appeared in this appeal. The suit was dismissed by the trial Court but on appeal it was decreed by the Judicial Commissioner, Vindhya Pradesh, on March 24, 1952. The learned Judicial Commissioner held that the respondent had the right of pre-emption and that the purchase money payable by him to the appellant for pre-emption of the property, was Rs. 3,000 and directed the respondent to pay this sum into Court within four months. The respondent duly paid this sum into Court. The appellant obtained Special Leave from this Court to appeal from the judgment of the learned Judicial Commissioner and thereafter withdrew from Court the amount paid in by the respondent. The present appeal arises under this leave.

The decree that was drawn up only stated that the appeal was allowed with costs and the period of grace was four months. In view of Order 20, rule 14 of the Code of Civil Procedure, the decree, in spite of its informality, must be understood as providing that upon the respondent paying the amount found payable as purchase money into Court within the time fixed, the appellant would deliver possession of the property to him and his title to it would be deemed to have accrued from the date of the payment into Court and that, in default of such payment the suit would stand dismissed with costs.

Now, there is not the slightest doubt that in withdrawing the money from Court the appellant had acted entirely on his free choice ; he had in no way been compelled to do so, nor been induced thereto by any act of the respondent. The respondent had done nothing to put the decree in execution and obtained possession of the property from the appellant. The appellant need not have withdrawn the money if he so liked and that would not in the least have prejudiced his interest. He has all along been in possession of the property since he purchased it on June 7, 1950, and he has been in enjoyment of the money also since he withdrew it from Court on November, 14, 1953.

It seems to me that on these facts the appellant cannot proceed with the appeal. He cannot be permitted to pursue inconsistent courses of conduct. By withdrawing the money, he has of his free choice, adopted the decree and must, therefore, be precluded from challenging its validity. He had no right to the money excepting such as the decree gave him. Having exercised that right he cannot be heard, to say that the decree was invalid and, therefore, the right which he had exercised had never existed.

The rule is well established in England as well as in our country, that a litigant is not permitted such inconsistent courses of conduct and, so far as I am aware, never been departed from. As early, as 1849 in *Tinkler* v. *Hilder*[1], Pollock, C.B. in dealing with a rule to set aside an order said :

> " It might be discharged simply on this narrow ground, that, under the circumstances of this case, the party applying to set aside the order in question in point of fact has adopted it by taking something under it."

In *King* v. *Simmonds*[2], and *Pearce* v. *Chaplin*[3], the same line of reasoning was adopted. It is true that in these cases the orders were said to have been adopted because

1. 4 Exch. 187 : 154 E.R. 1176.
2. (1845) 7 Q.B. 289.
3. (1846) 9 Q.B. 802.

costs, for the payment of which they had provided, had been received. It is also true that the orders were not such to which the parties directed to pay the costs, were entitled as a matter of right. But all these do not seem to me to make any difference. The question is, are the circumstances such that it would be inconsistent conduct to accept a benefit under an order and then to challenge it. I should suppose that for this purpose costs are as much benefit as anything else given by the order. Likewise when the orders were discretionary or such to which there was no right *ex debito justitiae,* there would be no reason to say that there could be no inconsistency if they were challenged after benefits under them had been accepted. For deciding such inconsistency, I am unable to discover that the discretionary nature of the order has any materiality.

Coming to more recent times, we get the case of *Dexters Ld.* v. *Hill Crest Oil Co. Ltd*[1]. There a person, who had taken money under an award made in a commercial arbitration in accordance with which a judgment had been entered in a special case stated to Court, was held precluded from appealing from that judgment. This, it will be noticed, was not a case where an order was considered to have been adopted because of receipt of costs given by it, but because of the receipt of the sum of money which was claimed and which was given by the award. Scrutton L.J. observed (p.358) :

> " It startles me to hear it argued that a person can say the judgment is wrong and at the same time accept payment under the judgment as being right."

I will conclude the reference to the English authorities by reading what Lord Russel of Killowen said in *Evans* v. *Bartlam*[2],

> " a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."

Of the cases on the point in our country I may refer to *Mani Lal Guzrati* v. *Harendra Lal*[3], *Banku Chandra Bose* v. *Marium Begum*[4], *Hurrybux Deora* v. *Johurmull Bhotoria*[5] and *Venkatarayudu* v. *Chinna*[6]. *Hurrybux Deora's case*[4], was an appeal from a decree in a suit for the redemption of a mortgage. The plaintiff had accepted the amount found by the decree passed by the trial Court to be due to him from the mortgagee in possession and receipt of the income of the mortgaged property, and had thereafter filed the appeal asking that he was entitled to more. Rankin, C.J., who delivered the judgment of the Court, held that there was no inconsistency in the conduct of the appellant and the rule I had so long been discussing had, therefore, no application. This was plainly right. The appellant had accepted the decree passed and in the appeal did not challenge its correctness so far as it went but only contended that it had not gone far enough. As has been said, he was not blowing hot and cold but only blowing hotter : see per Greer, L.J., in *Mills* v. *Duckworth*[7].

Referring to *King* v. *Simmonds*[8], *Pearce* v. *Chaplin*[9] and *Tinkler* v. *Hilder*[10], which I have earlier cited, Rankin, C.J., said (p. 714) that they

> " are clearly inapplicable except upon the basis that the defendant is seeking to challenge an order after accepting the benefit of a term or condition imposed upon the Opposite Party at whose instance the order was made."

He was of the view that this basis did not exist in the case which he had before him.

Rankin, C.J., also referred to another old English case, namely, *Kennard* v. *Harris*[11]. There, a rule to set aside an award of an arbitrator was discharged when it was shown that the party who had obtained the rule had accepted the costs of the reference and the award. Rankin, C.J., said with reference to this case that (p. 713),

1. L.R. (1926) 1 K.B. 348.
2. L.R. (1937) A.C. 473, 483.
3. (1910) 12 C.L.J. 556.
4. (1916) 21 C.W.N. 232.
5. (1929) 33 C.W.N. 711.
6. (1930) 58 M.L.J. 137.
7. (1938) 1 All E.R. 318, 321.
8. (1845) 7 Q.B. 289.
9. (1846) 9 Q.B. 802.
10. 4 Exch. 187 : 154 E.R. 1176.
11. (1824) 2 B. & C. 801.

" A person who accepts costs payable under an award or any other sum of money given to him by an award is held to be precluded from asking the Court to set aside the award."

He however also observed that

" An award is bad unless it deals with the whole matter submitted and *prima facie* cannot be set aside in part only."

It may be that Rankin, C.J., was making a distinction, which is obviously correct, between an award which can be set aside only as a whole because it is one and indivisible and a judgment which might be in severable parts in which case, the adoption of a part by a party would not preclude him from challenging another part which was independent. Rankin, C.J., did not think, and if I may say so with respect, correctly, that the principle of *Kennard* v. *Harris*[1], had any application to the facts of the case before him, for, there no part of the judgment was sought to be challenged by the appeal, excepting perhaps an independent part which by implication rejected the appellant's claim to a larger sum.

In *Venkatarayudu's case*[2], Venkatasubba Rao, J., after discussing various cases, to some of which I have referred, observed (p. 141),

" What is the principle underlying these decisions ? When an order shows plainly that it is intended to take effect in its entirety and that several parts of it depend upon each other, a person cannot adopt one part and repudiate another ".

It seems to me beyond doubt that the principle of these cases is applicable to the facts of the present appeal. Here we have a decree which is one and indivisible. The effect of it is that upon the respondent paying the money into Court he would be entitled to the property and to obtain possession of it and the appellant would be entitled to withdraw the money. The appellant has no right to the money whatsoever independent of the decree ; he had no right to compel the respondent to purchase the property from him on payment of a price. Indeed the appellant had been contending that the respondent was not entitled to purchase the property from him by paying the price. The appellant could have drawn out the money only on the basis that the decree had been properly passed. Therefore, by withdrawing the money he adopted its correctness and cannot now say it is incorrect. It seems to me that the observation of Venkatasubba Rao, J., in *Venkatarayudu's case*[2], (p. 141) that " to allow a party, who takes a benefit under such an order, to complain against it, would be to permit a breach of faith", would apply fully to the conduct of the appellant. So would the observations of Rankin, C.J., in *Hurrybux Deora's case*[3], on *King* v. *Simmonds*[4], *Pearce* v. *Chalpin*[5], and *Tinkler* v. *Hilder*[6]. The present is a case where the appellant was seeking to challenge an order after accepting the benefit of a term or condition, that is to say, as to the payment of money into Court, imposed upon the respondent at whose instance the order was made ; that the obligation to pay money was a term or condition imposed upon the respondent is manifest because the decree provided that if the money was not paid, the suit would stand dismissed with costs. Again the judgment in the present case is like an award for it is one whole and cannot be set aside in parts. Therefore what Rankin, C.J., said in regard to *Kennard* v. *Harris*[1], which turned on an award, namely, that a person who accepts costs or a sum of money given to him by an award cannot ask to have it set aside would also be applicable. find it impossible to conceive that this judgment consists of several parts or that such parts are severable.

The learned counsel for the appellant was able to refer us to only one case in support of his contention that the appeal could be proceeded with and that was *Sunder Das* v. *Dhanpat Rai*[7]. That was also a case of pre-emption. There, however, the plaintiff who had obtained the decree for pre-emption in his favour, had executed that decree and obtained possession of the property concerned. The defendant appealed from the decree but was unsuccessful in the first appellate Court. He then

1. (1824) 2 B. & C. 801.
2. (1930) 58 M.L.J. 137.
3. (1929) 33 C.W.N. 711.
4. (1845) 7 Q.B. 289.
5. (1846) 9 Q.B. 802.
6. 4 Exch. 187 : 154 E.R. 1176.
7. 16 P.R. 1907.

appealed to the Chief Court at Lahore and when the appeal was pending there, withdrew the purchase money paid into Court by the plaintiff under the decree of the trial Court. The Chief Court held that this did not preclude the defendant from proceeding with the appeal before it. The facts of that case were substantially different from those before us. It may be said that the defendant having been compelled to part with the property, was justified in withdrawing the money from the Court and that a withdrawal in such circumstances did not amount to an adoption of the decree. That cannot be said in the present case. Whether on the facts, *Sunder Das's case*[1] was rightly decided or not, is not a matter on which I feel called upon to express any opinion. If, however, that case intended to lay down a principle which would warrant the appellant on the facts of the case in hand in proceeding with this appeal, I am unable to agree with it. It would then be in conflict with all the authorities on the point and none of these was noticed in the judgment in that case. I do not think that *Sunder Das's case*[1] is of sufficient authority to warrant a departure from the principle uniformly followed by the Courts.

It is necessary, however, before I conclude, to refer to the comparatively recent case of *Lissenden* v. *C.A.V. Bosch Ltd.*[2]. That was a case in which a workman who had been awarded compensation for partial incapacity up to a certain date accepted the compensation so awarded and thereafter preferred an appeal claiming that compensation should have been awarded to him beyond that date and so long as he should be incapacitated. The Court of Appeal feeling itself bound by its earlier decision is *Johnson* v. *Newton Fire Extinguisher Company*[3], had held, somewhat reluctantly, that the workman having accepted money under the award could not challenge its validity by an appeal. In *Johnson's case*[3], it appears to have been held that a workman could not accept part of an award and claim to amend another part for that would be an attempt to " approbate and reprobate " the award and this could not be allowed. The House of Lords in *Lissenden's case*[2], held that *Johnson's case*[3], had been wrongly decided and that the workman before it was entitled to proceed with the appeal. The reason for this view was that acceptance by the workman of what had been found to be due to him does not operate to prevent him from appealing for some further relief. The case therefore was the same as that before Rankin, C.J., in *Hurrybux Deora* v. *Johurmull Bhotoria*[4]. The substance of the decision of the House of Lords was that there was no inconsistency between the appeal and the adoption of the award. That however cannot be said in the case before us now.

The House of Lords also pointed out that the Court of Appeal had misunderstood the doctrine against " approbating and reprobating ". It was said that that was a doctrine of Scottish law which in England had been held by high authorities to be equivalent to the equitable principle of election. It was observed that that equitable principle depended for its application on the intention of the executant of an instrument and was, therefore, not applicable to a case like the one the House of Lords had before it. It was also pointed out that the Common law principle of election had no application either, for, it depended on the existence of two rights or remedies, one alone of which could be chosen and in the case of an appeal there were no two rights or remedies.

I do not think the observations of the House of Lords on the doctrine against "approbating and reprobating" affect the question before us. All the learned Judges who delivered opinions in the case, including Lord Atkin, who expressed himself with some reservation, accepted the position that a litigant may lose his right of appeal by reason of his conduct after the judgment or award, for, by such conduct he may be estopped from appealing or may be considered in equity or at law as having released his right of appeal : see pp. 420, 429, 430 and 434. *Lis-*

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1. 16 P.R. 1907.
2. L.R. (1940) A.C. 412.
3. L.R. (1913) 2 K.B. 111.
4. (1929) 33 C.W.N. 711.

senden's case[1], does not, therefore, in my view throw any doubt on the principle that a litigant may be precluded from proceeding with an appeal if that would be inconsistent with his previous conduct in regard to the decree challenged by the appeal. It seems to me that the Courts in England have taken the same view of *Lissenden's case* [1]. In *Baxter* v. *Eckersley*,[2] the Court of Appeal expressly approved of the principle laid down in *Dexter's case*[3]. In *Banque Des Marchands De Moscou* v. *Kindersley*[4] Evershed M.R. referring to the phrases "approbating and reprobating" and "blowing hot and blowing cold" said at p. 119,

"These phrases must be taken to express, first, that the party in question is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, at least in a case such as the present, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his present action is inconsistent."

These two cases, it will be observed, were decided after *Lissenden's case*[1].

All these authorities leave no doubt in my mind that the rule preventing inconsistent conduct is firmly established. I think, for the reasons earlier mentioned, that the rule is properly applicable in the present case and the appellant cannot be allowed to proceed with the appeal. I wish however to make it clear that the applicability of the rule will depend on the facts of each case; it will depend on whether there has been actual inconsistency. I have found that there has been adoption in the present case and the prosecution of the appeal will result in the conduct of the appellant becoming inconsistent. That is all that I decide.

Before leaving the case, I think I ought to observe that the fact that the appellant had withdrawn the money after he had obtained leave from this Court makes no difference to the applicability of the principle. It was by such withdrawal that he adopted the decree and thereafter he is precluded from proceeding with the appeal. There is as much inconsistency in the present case as there would have been, if the appellant had withdrawn the money before he had obtained the leave.

For these reasons I would dismiss the appeal with costs.

ORDER :—In accordance with the majority judgment, the preliminary objection is overruled. The appeal will now be set down for hearing on merits.

K.L.B. *Preliminary objection overruled.*

SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B.P. SINHA, *Chief Justice*, S. K. DAS, A. K. SARKAR, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLAKAR, JJ.

Instalment Supply (Private) Ltd. and another .. *Petitioners**

v.

The Union of India and others .. *Respondents.*

Bengal Finance (Sales Tax) Act (VI of 1941)) *as extended to the State of Delhi (now the Union Territory of Delhi)—"Sale"—If includes hire-purchase transactions*—Explanation (I) *to definition of "Sale"—Scope—Provision extending the definition of "Sale" to "hire purchase"—If discriminatory and unconstitutional as offending Article* 14 *of the Constitution of India* (1950)—Res judicata—*If applicable to taxation for subsequent year.*

A hire purchase transaction partakes of the nature of a contract of bailment with an element of sale added to it. In such an agreement the hirer may not be bound to purchase the thing hired; he may or may not be. But in either case, if there is an obligation to buy or an option to buy, the goods delivered to the hirer by the owner on the terms that the hirer, on payment of a premium as also of a number of instalments shall enjoy the use of the goods, which ultimately may become his property the transaction amounts to one of hire purchase even though the title to the goods remained with the owner and shall not pass to the hirer until a certain event has happened, namely, that all the stipulated instalments have been paid, or that the hirer has exercised his option to finalise the purchase

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1. L.R. (1940) A.C. 412.
2. L.R.(1950) 1 K.B. 480.
3. L.R. (1926) 1 K.B. 348.
4. L.R. (1951) 1 Ch. 112.

* Petition No. 146 of 1958. 2nd May, 1961.

on payment of a sum, nominal or otherwise. The *non obstante* clause "notwithstanding that the seller retains a title to any goods as security for payment of the price " does not govern the main clause of *Explanation* I to definition of "Sale" in Bengal Finance (Sales Tax) Act (VI of 1941) as extended to the State of Delhi (now Union of Territory of Delhi). The *non obstante* clause has been added only to emphasise the categorical statement of the law contained in the main clause to the effect that a transfer of goods on hire-purchaser, etc., shall be deemed to be a " sale " even though there may be a stipulation to the effect that in spite of the transfer of the goods to the hirer, the owner retains title to those goods until the happening of the ultimate event, namely, completion of title at the option of the hirer.

There is thus not merely a contract of bailment *simpliciter* but also an element of sale, in a hire-purchase agreement and the Legislature has seized upon that element for the purpose of subjecting such a transaction to the sales tax.

It cannot be said that the extension of the definition of " Sale " to hire-purchase agreements is unconstitutional as discriminatory and infringing Article 14 of the Constitution. Hire-purchase transactions have been included within the definition of " sale " in section 2 (*g*) of the Central Sales Tax Act (LXXIV of 1956).

What the Sales Tax Department does, or does not do, cannot change the law. The Department had not estopped itself by issuing instructions to dealers.

In matters of taxation there is no question of *res judicata* because each year's assessment is final only for that year and does not govern later years, because it determines only the tax for a particular period.

Petition under Article 32 of the Constitution for enforcement of fundamental rights.

Veda Vyasa, Senior Advocate (*S. K. Kapur* and *Ganpat Rai,* Advocates, with him), for Petitioners.

C. K. Daphtary, Solicitor-General of India (*R. Gopalakrishnan* and *D. Gupta,* Advocates, with him) for Respondents.

The Judgment of the Court was delivered by

Sinha, C.J.—The petitioners have moved this Court under Article 32 of the Constitution for a writ or order in the nature of *mandamus* and/or prohibition and/or other suitable writ, order or direction to the respondents not to levy, charge or collect any sales tax on transactions of what the petitioners characterised as hire-purchase agreements, a typical example of which is contained in Annexure ' A ' to the petition, to be hereinafter examined in detail.

The first petitioner is a private limited company incorporated under the Companies Act, with its registered office at Janpath, New Delhi. The second petitioner is the Managing Director and shareholder of that company and is directly interested in the result of this application, because it is claimed that his rights and property are directly involved. The company has been carrying on in Delhi the business of financing the purchase of new as well as second hand motor cars and other kinds of motor vehicles. The system adopted by the Company for financing a purchase such as aforesaid is as follows. A person desiring to purchase a motor vehicle fixes a bargain with the owner and the petitioner-Company would then advance the necessary finance on the terms and conditions appearing in a printed copy of the agreement, marked Annexure ' A ' to the petition. According to that agreement, the Company charges the ' Hirer ' an inital deposit by way of premium as a consideration for granting the lease of the vehicle which deposit becomes the absolute property of the Company ; the premium charged as aforesaid is a substantial amount, being usually 25 per cent. of the price in respect of new vehicles. The ' Hirer ' undertakes to pay instalments and when all the instalments are paid, the vehicle becomes the property of the 'Hirer' at his option, on payment of rupee one to the Company, as a consideration for the option ; until all the stipulated instalments have been paid and the option exercised as aforesaid, the vehicle remains the property of the Company as owners. The ' Hirer ' is delivered possession of the vehicle and he remains responsible to the Company for damage or destruction or loss. The ' Hirer ' has to pay interest at the rate of one per cent. per mensem on all sums overdue. Until the option of purchase is exercised by the ' Hirer', he is at liberty to return the vehicle and to put an end to the Hiring Agreement, on certain terms.

Thus, under the agreement, the 'Hirer' has use of the vehicle, which is entrusted to him as the property of the Company, and it is open to the 'Hirer' to become the purchaser of the vehicle as aforesaid, but he is not bound to do so. The hire-money received by the Company, it is contended, is not a part of the price of the goods sold and is thus not liable to be taxed as sale-price. The Bengal Finance (Sales Tax) Act, 1941 (Bengal Act VI of 1941) was extended to the State of Delhi, which is now the Union Territory of Delhi. In pursuance of the provisions of that Act, the Sales Tax Authorities started demanding and levying sales tax on all transactions of the nature aforesaid on the ground that the instalments paid by the hirers to the Company were sales-price and, therefore, liable to sales tax. The Company challenged the right of the Sales Tax Authorities to levy any such tax on the ground that the law was beyond the competence of the legislature. Ultimately, the Company moved the Punjab High Court (Circuit Bench at Delhi) under Articles 226 and 227 of the Constitution. In the Writ Petition, which was registered as Civil Writ Application No. 289-D of 1954, the Company prayed for a writ in the nature of prohibition and/or *mandamus* restraining the respondent from realising or levying any sales tax under the provisions of the Bengal Act, extended to Delhi. There was also a prayer for a writ of *certiorari* quashing certain orders passed by the Sales Tax Authorities in 1953-54. The said application was heard by a Division Bench, which allowed the petition and issued a *mandamus* to the State to forbear from enforcing its notice for the realisation of the sales tax. It was held by the High Court that the State Legislature had not the power to enlarge the meaning of the words "Sale of Goods" by going beyond the meaning attached to it by the Sale of Goods Act. After the judgment aforesaid of the High Court of Punjab, it is further alleged, a settlement was arrived at between the companies carrying on hire-purchase business in Delhi and the Commissioner of Sales Tax, who issued a circular, being Circular No. 10 of 1956, containing the following decisions of the Department :—

"(i) Companies which are exclusively engaged in the hire purchase business will not be treated as dealers and their certificate of registration will be cancelled.

(ii) Companies which are partially engaged in the business of hire purchase will continue to be dealers as hithertofore and their hire purchase transactions will be appropriately examined in the light of the judgment of the Punjab High Court, and will be liable to Sales Tax at one stage.

(iii) As a result of (i) above, sales made to the above Companies by the dealers in vehicles would be liable to Sales Tax at the hands of the latter.

(iv) In respect of vehicles, and machineries etc. for which tax has been paid, at the time of purchases thereon from the market, no Sales Tax would be payable in respect of hire monies collected on them by the hire purchase companies or on their re-sale or re-hire following repossession or on the exercise of the option of purchases by the hirer.

(v) In respect of second hand vehicles purchases by the companies from private individuals for purposes of hire purchase, the companies will not be liable to any sales tax either at the time of purchase or in respect of subsequent transaction thereon. The Companies will be as other non-registered dealers, in view of (i), their Registration Certificates in respect of hire purch ase business having been cancelled.

(vi) The assessments which are already made will not be re-opened except in the case of Messrs. Instalment Supply Co. Ltd. for which there are specified orders of the High Court.

(vii) In their up-to-date assessment, the hire purchase Companies should take upon themselves the responsibility to pay tax which they have save by making tax free purchases either from dealers or from non-registered dealers. The assessment will, however, be made accordingly as before in the normal way."

Thereafter in the case of *Mithan Lal* v. *State of Delhi*[1], this Court examined the vires of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi, and came to the conclusion that the law had been validly promulgated. According to that decision, the definition of 'sale' could be legally extended so as to make it permissible to tax sale of goods involving the supply of materials in pursuance of building contracts. As a result of the decision aforesaid of this Court, a Press Note was issued by the Commissioner of Sales Tax, Delhi, to the effect that provision re-

1. (1958) S.C.J. 899 : (1959) S.C.R. 445.

garding levy of tax on hire-purchase transactions was valid and that all hire-purchase dealers as come within the purview of sections 4 and 7 of the Bengal Finance (Sales Tax) Act, 1941, as extended to Delhi, are liable to pay sales tax and to get themselves registered under the Act; that all such hire-purchase dealers as were formerly registered with the Sales Tax Department shall be deemed to be registered with effect from the 1st of April, 1958 for the purpose of the Act and that all hire-purchase dealers who had not got themselves registered so far should immediately have themselves so registered in order to avoid being penalised for contravention of the provisions of the Act. In pursuance of the aforesaid circular of the Department, the petitioner company was also called upon to comply with the requirements of the Act. The Company made representation to the Commissioner of Sales Tax that the Company and other such companies which deal in hire purchase were not liable to pay sales tax, but the Commissioner of Sales Tax refused to accept the Company's contention and answered to the following effect :—

" 1. The incidence of sales tax on such transactions is to be governed by the provisions of sections 3 and 4 of the Central Sales Tax Act, 1956. If however, the vehicles are purchased by a Company having its place of business in Delhi from a dealer outside Delhi on payment of sales tax of that State and the vehicle is hire-purchased to the party in that very State, neither Delhi Sales Tax nor Central Sales Tax will be leviable on the Delhi firm irrespective of the act that the Hire-purchase Agreement is entered into at Delhi.

If, however, vehicle is purchased in State 'A' but is hire-purchased to a party in State 'B' Central Sales Tax will be leviable in the State according to the rules in force in that State.

2. The hire-purchase transactions of secondhand vehicles, where the owner approaches the Hire Purchase Co. for finances against the vehicles, will be leviable to sale tax, because according to the Hire-purchase Agreement the property in the vehichle vests in the Hire Purchase Company and this property is to be transferred to the so-called owner by virtue of the Hire-purchase transaction.

Secondhand vehicles purchased outside Delhi and hire-purchased to the parties outside Delhi or hire purchase transactions conducted outside Delhi in which owner approaches the Hire-purchases Company for finance will be governed by the clarification given in 1 above.

3. In the case of vehicles purchased by the Hire-purchase Companies from the local registered dealers, they will not be required to pay any sales tax because all hire-purchase Companies will be registered and will be entitled to make tax free purchases of such vehicles. It is, therefore, regretted that it is not possible to accede to the request made in this behalf.

4. Sales-tax will be payable on total amounts charged by the Hire-purchase Company from the hirer and it is not possible to waive sales tax on the so-called incidental charges.

5. It is regretted that it is not possible to alter the date of liability of the Hire-purchase Company which has already been fixed with effect from 1st of April, 1958, in pursuance of the Supreme Court Judgment. It is true that the Press Note was issued in the month of June and so Hire-purchasee Companies have been making purchases of vehicles on payment of sales tax. The Hire-purchase Companies are advised to approach the dealers for refund of the Sales Tax paid by them on such purchases.

If, however, it is not possible for any Hire Purchase Company to obtain refund of the sales tax so paid by them, the amounts so paid may be adjusted towards their liability on the hire purchase transactions."

On receipt of the answer of the Department, as set out in the previous paragraphs, the petitioners moved this Court under Article 32 of the Constitution on the ground that the " threatened action of the respondents is illegal and unconstitutional as the petitioner company is not liable to pay sales tax on the transactions " described above.

In support of the petition, the learned counsel for the petitioners has raised the following contentions : (1) that the transactions in respect of which the petitioners are sought to be taxed are not covered by the *Explanation* to section 2 (*g*) of the Bengal Finance (Sales Tax) Act, as extended to Delhi ; (2) alternatively, that is to say, if it is held that the *Explanation* covers the transactions of the nature aforesaid, then the *Explanation*, extending the concept of 'sale' is unconstitutional ; (3) that in any case it is unconstitutional as it infringes Article 14 of the Constitution in so far as the State of Delhi has been selected for hostile discrimination ; (4) that the judgment of the Punjab High Court in *Instalment Supply Ltd.*

New Delhi v. *State of Delhi*[1], is final and conclusive as between the parties to that judgment ; (5) that if it is held that the judgment of the Punjab High Court, referred to above, has been superseded by the judgment of this Court in *Mithan Lal's Case*[2], that judgment cannot be given retrospective operation ; and (6) lastly, that the settlement between the Department and the Companies transacting business in "Hire-purchase" is binding until the decision of this Court in *Mithan Lal's Case*[2], aforesaid. We shall examine these arguments in the order in which they have been stated.

The most important question in this case is : What is the true nature and character of the transaction which is the subject matter of the present controversy ? Do the terms and conditions of the agreement typified by Annexure 'A' to the petition, as described above, constitute a mere agreement of hiring, as contended on behalf of the petitioners, or do they constitute a contract of hire-purchase, within the meaning of *Explanation* (1) to the definition of 'sale' contained in the statute in question, as contended on behalf of the respondents ? There is no doubt that the concept of 'sale' as it appears from the following words of the definition, along with *Explanation* (1), is rather extended. In the definition of the term 'sale' for the purposes of the Act, the words are as follows :—

> "'Sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.
>
> *Explanation* 1.—A transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale."

It is clear from the definition that it includes not only what may be compendiously described as a sale under the Sale of Goods Act, but also transactions, which, strictly speaking, are not sales, not even 'contracts of sale' but only contain an element of sale, that is the option to purchase, and that is the reason why the *Explanation* ends with the words " be deemed to be a sale " thereby indicating that a legal fiction has been introduced into the concept of 'sale' as ordinarily understood. The *Explanation* has included within its amplitude a mere transfer of goods without the transfer of title to the goods, if it is in the course, of an agreement of the nature of " hire-purchase ", or other instalment system of payment. A contract of hiring, under the Common Law, is one of the species of a contract of bailment and has, during the last 60-70 years, undergone a series of refinements as a result of modern industrial and commercial developments. The term 'hire-purchase' has not been definied in the Act. We have, therefore, to construe the expression in its ordinary Common Law sense, which may best be expressed in terms of the Dictionary of English Law by Earl Jowitt at pages 913-914, which runs as follows :

> "*Hire-purchase*—a system whereby the owner of goods lets them on hire for periodic payments by the hirer upon an agreement that when a certain number of payments have been completed, the absolute property in the goods will pass to the hirer, but so that the hirer may return the goods at any time without any obligation to pay any balance of rent accruing after return ; until the conditions have been fulfilled, the property remains in the owner. The instrument by which the hire-purchase is effected does not ordinarily require registration as a bill of sale (*Exp. Crawcour*[3]) ; the hirer is 'reputed owner' within the Bankruptcy Act, 1914 (*Exp. Brooks*[4]) ; but the hirer does not 'agree to buy' within the Factors Act or the Sale of Goods Act, 1893, so as to be able to sell or pledge the goods a if he were a mercantile agent (*Helby* v. *Matthews*[5] ; *Brooks* v. *Bernstein*[6]). Such agreements are to be distinguished from agreements such as in *Lee* v. *Butler*[7], which are in fact a sale, the price being paid in instalments with the condition that the property passes when all the instalments have been paid ; here there is a binding agreement for the party to purchase, where in a true hire-purchase agreement there is not."

In Halsbury's Laws of England, Third Edition, Volume 19, paragraph 823, at pages 510-511, the nature of a hire-purchase transaction is thus expressed :

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1. A.I.R. 1956 Punj. 177.
2. (1958) S.C.J. 899 : (1959) S.C.R. 445.
3. L.R. (1878) 9 Ch. D. 419.
4. L.R. (1883) 23 Ch. D. 261.
5. L.R. (1895) A.C. 471.
6. L.R. (1909) 1 K.B. 98.
7. L.R. (1893) 2 Q.B. 318.

"The contract of hire purchase is one of the variations of the contract of bailment, but it is a modern development of commercial life, and the rules with regard to bailments, which were laid down before any contract of hire purchase was contemplated, cannot be applied *simpliciter*, because such a contract has in it not only the element of bailment but also the element of sale. At Common law the term 'hire purchase' properly applies only to contracts of hire conferring an option to purchase, but it is often used to describe contracts which are in reality agreements to purchase chattels by instalments, subject to a condition that the property in them is not to pass until all instalments have been paid. The distinction between these two types of hire purchase contracts is, however, a most important one, because under the latter type of contract there is a binding obligation on the hirer to buy and the hirer can therefore pass a good title to a purchaser or pledgee dealing with him in good faith and without notice of the rights of the true owner, whereas in the case of a contract which merely confers an option to purchase there is no binding obligation on the hirer to buy, and a purchaser or pledgee can obtain no better title than the hirer had, except in the case of a sale in market overt, the contract not being an agreement to buy within the Factors Act, 1889, or the Sale of Goods Act, 1893."

The observations quoted above are based mostly on two leading cases which have come to be regarded as the *locus classicus* upon the subject, namely, *Lee* v. v. *Butler*[1], in which the transaction was described by Lord Esher, M.R., as "Hire and Purchase Agreements" and *Helby* v. *Matthews*[2], in which the House of Lords distinguished the former case on the ground that in that case there was a binding contract to buy and not merely an option to buy, without any obligation to buy. Both these cases were decided in terms of Factors Act of 1889 (52 & 53 Vict. c.45, s.9). Both the kinds of agreements exemplified by the two leading cases aforesaid would now be included in the definition of 'hire-purchase' as contained in section 21 of the Hire Purchase Act, 1938 [1 & 2 Geo. 6, c. 53) :—

"'Hire-purchase agreement' means an agreement for the bailment of goods under which the bailee may buy the goods or under which the property in the goods will or may pass to the bailee, and where by virtue of two or more agreements, none of which by itself constitutes a hire-purchase agreement, there is a bailment of goods and either the bailee may buy the goods, or the property therein will or may pass to the bailee, the agreements shall be treated for the purposes of this Act as a single agreement made at the time when the last of the agreements was made."

It is clear that under the Law, as it now stands, which has now been crystallised into the section of the Hire Purchase Act, quoted above, the transaction partakes of the nature of a contract or bailment with an element of sale, as aforesaid, added to it. In such an agreement, the hirer may not be bound to purchase the thing hired ; he may or may not be. But in either case, if there is an obligation to buy, or an option to buy, the goods delivered to the hirer by the owner on the terms that the hirer, on payment of a premium as also of a number of instalments, shall enjoy the use of the goods, which ultimately may become his property, the transaction amounts to one of hire-purchase, even though the title to the goods has remained with the owner and shall not pass to the hirer until a certain event has happned, namely, that all the stipulated instalments have been paid, or that the hirer has exercised his option to finalise the purchase on payment of a sum, nominal or otherwise.

But it has been contended on behalf of the petitioners that there is no binding agreement to purchase the goods and that title is retained by the owner not as a security for payment of the price but absolutely. According to third term of the agreement, on the hirer duly performing and observing the terms of the agreement, with particular reference to the payment of the monthly instalments,

"the hiring shall come to an end and the vehicle shall, at the option of the hirer, become his absolute property; but until such payments as aforesaid have been made, the vehicle shall remain the property of the owners. The hirer shall also have the option of purchasing the vehicle at any time during the currency of this Agreement by paying in one lump sum the balance of all the hire hereinbefore mentioned and any other expenses incurred by the owners relating to the transaction."

It is clear, therefore, that in addition to the contract of hiring an option has been given to the hirer to purchase or not to purchase. The more serious question on this part of the petitioners' contention is whether the *non obstante* clause in the

1. L.R. (1893) 2 Q.B. 318. 2. L.R. (1895) A.C. 471.

Explanation " notwithstanding that the seller retains a title to any goods as security for payment of the price " governs the main clause of the *Explanation.* In our opinion, it does not. The *non obstante* clause has been added only to emphasise the categorical statement of the law contained in the main clause to the effect that a transfer of goods on hire-purchase, etc., shall be deemed to be a ' sale ' even though there may be a stipulation to the effect that in spite of the transfer of goods to the hirer, the owner retains title to those goods until the happening of the ultimate event, namely, completion of title at the option of the hirer.

There is, thus no doubt that the agreement in question does contain not only a contract of bailment *simpliciter* but also an element of sale, which element has been seized upon by the legislature for the purpose of subjecting a transaction like that to the sales tax.

This leads us to the second ground of attack raised by the petitioners, namely, that the *Explanation*, if it has the effect of extending the concept of ' sale ' to what, in law, is not a real sale, but only an incipient or inchoate sale, then in so far as the law has extended the definition of ' sale ' it is unconstitutional. This contention has lost all its force, if ever it had any, in view of the decision of this Court in *Mithan Lal's Case.*[1]

But then it is argued that *Mithan Lal's Case*[1] requires re-consideration and that, in any view of the matter, this Court did not consider the further attack based on Article 14 of the Constitution. It is true that in *Mithan Lal's Case*[1] the contention that the enactment in question had infringed Article 14 of the Constitution had not been raised. This Court, therefore, had no occasion to pronounce on that aspect of the controversy. We have, therefore, to consider the contention under head (3), namely, that though the Parliament may have had the power to tax something which was not strictly speaking a ' sale ' the law is open to the attack that it discriminates against traders in Delhi inasmuch as, it is further contended, such a law has not been made applicable to the whole of India. In our opinion, there is no substance in this contention because no proper foundation was laid in the pleadings for supporting such a contention. It has not been averred that other Part ' C ' States have not been similarly treated. On the other hand, it does appear that under the Central Sales Tax Act (LXXIV of 1956), the definition of ' Sale ' contains the extended definition, without the *non obstante* clause, discussed above. Section 2 (*g*) of the Central Sales Tax Act, 1956, has the following definition :

> " ' Sale' with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire purchase or other system of payment by instalments, but does not include a mortgage or hypothecation of or a charge or pledge on goods."

It would thus appear that hire purchase transactions have been included within the definition of ' sale ' for the purpose of Central Sales Tax, and this definition has become applicable throughout India, and it cannot, therefore, be said that the State of Delhi, and now the Union Territory of Delhi, has been selected for hostile discrimination. In our opinion, therefore, there is no substance in the contention that the extended definition of 'sale' in the main statute infringes Article 14 of the Constitution.

Now, the remaining contentions raised on behalf of the petitioners may be disposed of by observing that what the Sales Tax Department does, or does not do, cannot change the law. The Department issued its instructions to the Sales Tax Officers, in conformity with the law as laid down in the judgment of the Punjab High Court in *Instalment Supply Ltd., New Delhi* v. *State of Delhi*[2]. This Court later laid down the law more authoritatively in *Mithan Lal's Case*[1] and the Department was bound to take notice of what this Court had laid down. It cannot, therefore, be argued that the Department had, in any sense estopped itself by issu-

1. (1958) S.C.J. 899: (1959) S.C.R. 445. 2. A.I.R. 1956 Punj. 177.

ing those instructions, or that this Court, by laying down the law in *Mithan Lal's Case*[1] had laid down a new rule of law which has no application to pending proceedings for levy, assessment and realisation of sales tax, either in Delhi or elsewhere.

There is another answer to the point of *res judicata* raised on behalf of the petitioners, relying upon the decision of the Punjab High Court in *Instalment Supply Ltd., New Delhi* v. *State of Delhi*[2]. It is well settled that in matters of taxation there is no question of *res judicata* because each year's assessment is final only for that year and does not govern later years, because it determinenes only the tax for a particular period. (See the decision in the House of Lords in *Society of Medical Officers of Health* v. *Hope (Valuation Officer)*[3], approving and following the decision of the Privy Council in *Broken Hill Proprietary Company Limited* v. *Municipal Council of Broken Hill*[4].

As all the contentions raised on behalf of the petitioners fail, this petition is dismissed with costs.

Petition dismissed.

SUPREME COURT OF INDIA.

(CRIMINAL APPELLATE JURISDICTION).

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J.R. MUDHOLKAR, JJ.

B.K. Kar .. *Appellant**

v.

The Hon'ble the Chief Justice and his companion Justices of the Orissa High Court and another .. *Respondents.*

Contempt of Court—Appeal against conviction for—Judges who tried the appellant for contempt and convicted him—If to be impleaded as respondents—Proper practice—Contempt—Disobedience of orders of superior Courts by inferior Courts—Liability for contempt—Considerations.

Where Judges of a High Court try a person for contempt and convict him they merely decide a matter and cannot be said to be interested in any way in the ultimate result in the sense in which a litigant is interested. The decision of Judges given in a contempt matter is like any other decision of those Judges, that is, in matters which come up before them by way of suit, petition, appeal or reference. Since this is the real position there is no warrant for the practice which is in vogue in India today of making the Chief Justice and Judges of the High Court who gave the decision respondents to an appeal against the decision of the High Court in a contempt matter. In a contempt matter there is no question of a relief being claimed against the Chief Justice and the Judges of the High Court The present practice should, therefore, be discontinued and instead as in England, the title of such proceedings should be "*In re*......X, Y, or Z (the alleged contemnor).

Before a subordinate Court can be found guilty of disobeying the order of a superior Court and thus to have committed contempt of Court, it is necessary to show that the disobedience was intentional. What is necesary to establish in such a case is that the subordinate Court knew of the order of the High Court and that knowing the order it disobeyed it. The knowledge must, however be obtainted from a source which is either authorised or otherwise authentic. Where there was an application illegibly signed and bearing no counere signature of any pleader informing the Court of the order of the High Court and also a telegram from a private individual to some pleader not appearing in the case and there was no affidavit accompanying the application to assure the Court of the authenticity of those matters, the subordinate Court's refusal to act on those materials did not amount to contempt of Court in the circumstances of the instant case.

Appeal by Special Leave from the Judgment and Order dated the 7th November, 1958, of the Orissa High Court, in Original Criminal Miscellaneous Case No. 8 of 1958.

A.V. Viswanatha Sastri, Senior Advocate (*H.R. Khanna* and *T.M. Sen*, Advocates, with him), for Appellant.

H.N. Sanyal, Additional Solicitor-General of India (*B.M. Patnaik*, Advocate and *S.N. Andley*, *J.B. Dadachanji* and *Rameshwar Nath*, Advocates of *M/s. Rajinder Narain and Co.*, with him), for Respondent No. 1.

1. (1958) S.C.J. 899: (1959) S.C.R. 445.
2. A.I.R. 1956 Punj. 177.
3. L.R (1960) A.C. 551.
4. L.R. (1925) A.C. 94.

* Crl. A. No. 58 of 1959. 14th March, 1961.

The Judgment of the Court was delivered by

Mudholkar, J.—In this appeal by Special Leave, the appellant who has been found guilty of contempt of Court by the High Court of Orissa is challenging his conviction. To this appeal, as well as to Criminal Appeal No. 2 of 1960 in which another person is challenging his conviction for contempt of Court by the same High Court the Chief Justice and the Judges of the High Court have been made parties. The learned Addtional Solicitor-General who has put in an appearance for a limited purpose has raised a point that in such matters it is not at all necessary to make the Chief Justice and the Judges of the High Court parties. He points out that in England in all contempt matters the usual title of the proceeding is " *In re*..........(so and so) ", that is, the person who is proceeded against for contempt. The same practice, according to him, is followed in appeals. We must however, point out that in appeals preferred to the Privy Council from convictions for contempt by the High Courts in India as well as in appeals before this Court, the Chief Justice and the Judges of the High Court concerned have been made respondents. In *Ambard* v. *Attorney-General for Trinidad & Tobago*[1], we find that the Attorney-General was made a party to the appeal. The question raised by the learned Additional Solicitor-General is of some importance and we think it desirable to decide it.

In every suit or appeal persons who claim relief or against whom relief has been given or persons who have or who claim the right to be heard must undoubtedly be made parties. That is because they have an interest in the decision or the result of that case. But where Judges of a High Court try a person for contempt and convict him they merely decide a matter and cannot be said to be interested in any way in the ultimate result in the sense in which a litigant is interested. The decision of Judges given in a contempt matter is like any other decision of those Judges, that is, in matters which come up before them by way of suit, petition, appeal or reference. Since this is the real position we think that there is no warrant for the practice which is in vogue in India today, and which has been in vogue for over a century, of making the Chief Justice and Judges parties to an appeal against the decision of a High Court in a contempt matter. We may point out that it is neither necessary nor appropriate to make the Chief Justice and the Judges of a High Court parties to a legal proceeding unless some relief is claimed against them. In a contempt matter there is no question of a relief being claimed against the Chief Justice and the Judges of the High Court. The present practice should, therefore, be discontinued and instead, as in England, the title of such proceedings should be " *In re*..........(the alleged contemner).

Now we address ourselves to the merits of this case. The appellant was a Sub-Divisional Magistrate at Dhenkanal in the year 1957. In a criminal matter before him a Magistrate III Class, Dhenkanal passed an order under section 552, Criminal Procedure Code putting the complainant, one Golam Mohammed in possession of some property. The order was actually executed on October, 14, 1955. It was also confirmed by the Additional District Magistrate in appeal. It was, however, set aside by the High Court in revision on August 27, 1957. The opposite party, one Sarif Beg, thereupon made an application on November 20, 1957, before the appellant for redlivery of possession. This application was opposed by Golam Mohammed. It was heard by the appellant on November 21, 1957, and order was reserved till November, 23, 1957. Apparently the order was not ready and so the matter was adjourned to November 27, 1957. That day the application was allowed and complicance was directed by December, 2, 1957.

While these proceedings were going on, an application was made by the complainant to the High Court apparently for a review of its previous order. By order dated November 23, 1957, this application was admitted by P.V. Balakrishna Rao, J. He also granted an interim stay of the proceedings in the case before the Sub-Divisional Magistrate, Dhenkanal, but did not direct that the said order should be communicated to the Sub-Divisional Magistrate by telegram. On November 26, 1957, an application bearing an illegible signature was made to the

1. L.R. (1936) A.C. 322.

Magistrate in which, amongst other things, it was stated "that the petition being not maintainable the opposite party has once more moved the Hon'ble High Court in the matter and it has been ordered that further proceedings should be stayed until the disposal of the opposite party's revision." Evidently, by "opposite party" the applicant meant himself and by "revision" he meant the review application made by him. Along with this application the complainant filed a telegram addressed to Mr. Neelakanth Misra, Pleader, Dhenkanal, saying "Golam Mohammad's case further proceedings stayed, Ram". It does not appear from the order-sheet of the Magistrate that in the proceedings before him Mr. Neelakanth Misra represented the complainant. However, we will assume that he did so. Even then, there is nothing to indicate as to who "Ram" is. There is no suggestion that he was the Advocate who represented the complainant before the High Court in the proceeding before it. It would appear that on November 26, 1957, the Sub-Divisional Magistrate was out of headquarters and, therefore, the second officer directed that the application be placed before the Sub-Divisional Magistrate on his return. The Sub-Divisional Magistrate refused to act on this telegram but made the following endorsement on November 27, 1957, on what is said to be the complainant's application :

"No action can be taken on telegram. File."

He then proceeded to deliver his order on the opposite party's application for restitution. A copy of the order of the High Court was received at Dhenkanal on November 23, 1957. On that day the Sub-Divisional Magistrate was absent and the second officer made the following entry in the order sheet :

"Seen. A.D. M.'s D. B. No. 326, dated 28th November, 1957. In Cr. Misc. Case No. 90/57 Hon'ble High Court has stayed further proceedings. Stay further proceedings. Put up before S. D. M. Inform parties."

Consequent on this endorsement no writ for re-delivery of possession was issued and thus the *status quo* was maintained.

Upon perusal of the records on August 18, 1958, in connection with the application for review made by the complainant the High Court ordered the issue of a notice to the appellant on August 25, 1958, to show casue why he should not be committed for contempt. The appellant in a lengthy statement explained all the facts and also stated that he had not the slightest intention to disobey or go beyond the orders and directions of the High Court and that he passed the order dated November 27, 1957, because the complainant's application for stay was not accompanied by an affidavit ; nor was it signed by the complainant or his lawyer He further stated that he should not be held liable for contempt because he had "no intention to prejudice or affect the course of justice in the disposal of the matter pending before the High Court" and added that he acted in good faith in discharge of his official duties. Finally he stated that if after considering his explanation the Court found him guilty of disobeying its order he expressed his regret and tendered his apology for what he had done. This apology was regarded as merely a conditional apology and was not accepted. After an elaborate consideration of the case law on the question of disobedience of orders by subordinate Courts, the High Court found the Sub-Divisional Magistrate guilty of contempt and sentenced him to pay a fine of Rs. 100. By the same order the High Court dismissed the review application preferred before it by the complainant.

Before a subordinate Court can be found guilty of disobeying the order of the superior Court and thus to have committed contempt of Court, it is necessary to show that the disobedience was intentional. There is no room for inferring an intention to disobey an order unless the person charged had knowledge of the order. If what a subordinate Court has done is in utter ignorance of an order of a superior Court, it would clearly not amount to intentional disobedience of that Court's order and would, therefore, not amount to a contempt of Court at all. There may perhaps be a case where an order disobeyed could be reasonably construed in two ways and the subordinate Court construed it in one of those ways

but in a way different from that intended by the superior Court. Surely, it cannot be said that disobedience of the order by the subordinate Court was contempt of the superior Court. There may possibly be a case where disobedience is accidental. If that is so, there would be no contempt. What is, therefore, necessary to establish in a case of this kind is that the subordinate Court knew of the order of the High Court and that knowing the order it disobeyed it. The knowledge must, however, be obtained from a source which is either authorised or otherwise authentic. In the case before us it is not clear as to who the person who signed the application dated November 27, 1957, was because the signature is illegible. It was not countersigned by a pleader nor is there anything to show that it was presented in Court by a pleader authorised to appear on behalf of the complainant. Furthermore, it was not accompanied by an affidavit. Therefore, there could be no guarantee for the truth of the facts stated therein. No doubt, it was accompanied by a telegram and even though it was addressed to a pleader there is nothing to indicate that he was authorised to appear for the complainant. Further it is not possible to say as to the capacity of the sender. Had the telegram been received from the Court or from an advocate appearing on behalf of the complainant before the High Court and addressed either to the Court or pleader for the complainant different considerations would have arisen and it may have been possible to take the view that the information contained therein had the stamp of authenticity. Of course, we do not want to lay it down here as law that every telegram purporting to be signed by an advocate or by a pleader is *per se* guarantee of the truth of the fact stated therein and also of the fact that it was actually sent by the person whose name it bears. In order to assure the Court about these matters an affidavit from the party would be necessary. Upon the materials before us we are satisfied that the Sub-Divisional Magistrate was entitled to ignore the telegram as well as the application. We, therefore, hold that his refusal to act on the telegram did not amount to contempt of Court. We may add that the fact that on receiving a copy of the High Court's order through the Additional District Magistrate not only were further proceedings stayed but a writ to re-deliver possession was not permitted to issue. This would show clearly that there was no intention on the part either of the Sub-Divisional Magistrate or the second officer to disobey the order of the High Court. The conviction as also the fine of the appellant is erroneous and accordingly set aside.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

The State of Punjab .. *Appellant**

v.

Nathu Ram .. *Respondent.*

Civil Procedure Code (V of 1908), Order 22, rule 4—Death of one respondent—Appeal if abates against surviving respondents—Appeal against joint decree-holders—Abatement against one of them—Effect.

When Order 22, rule 4 of the Civil Procedure Code does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal. It is only when it is not possible for the Court to deal with such matters that it will have to refuse to proceed further with the appeal and therefore dismiss it. Ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court Where a decree is joint and indivisible the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against

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* Civil Appeals Nos. 635 to 641 of 1957. 1st May, 1961.

the deceased respondent even if the rights of the respondents in the subject-matter of the decree are specified. To get rid of a joint decree it was essential for the appellant to implead both the joint decree-holder in the appeal. In the absence of one joint decree-holder the appeal is not properly framed and the appeal against the surviving decree-holder alone cannot proceed where the appeal has abated against the other respondent.

Appeals from the Judgment and Decree dated the 8th September, 1954, of the Punjab High Court, in Regular First Appeals Nos. 42, 43, 44, 45, 46, 47 and 48 of 1949.

R. Gopalakrishnan, T. M. Sen and *R. H. Dhebar*, Advocates, for appellant in all the appeals.

Darya Dutt Chawla, Advocate, for respondent in all the appeals.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Civil Appeal No. 635 of 1957 is an appeal, by certificate, and raises the question regarding the effect of the abatement of the appeal, by the State of Punjab, against Labhu Ram, one of the respondents, on the State appeal against Nathu Ram, co-respondent.

Civil Appeals Nos. 636-641 of 1957 also raise the same question between the same parties.

The facts leading to the appeal are that the Punjab Government acquired on lease certain parcels of land belonging to Labhu Ram and Nathu Ram, for different military purposes, under the Defence of India Act, 1939 (XXXV of 1939). Labhu Ram and Nathu Ram, brothers, refused to accept the compensation offered to them by the Collector and applied to the Punjab Government, through the Collector, under rule 6 of the Punjab Land Acquisition (Defence of India) Rules, 1943, hereinafter called the Rules, as amended by the Notification of the Punjab Government No. 1444-HM-44/19124, dated 10th March, 1944, and published in the *Punjab Gazette*, Part I, dated 17th March, 1944 (Home Department). The State Government referred the matter to an arbitrator as required under rule 10, who, after enquiry, passed an award ordering the payment of an amount higher than what was offered by the Collector and also ordered the payment of certain amount on account of income-tax which would be paid on the compensation received. The State Government appealed against the award to the High Court of Punjab. During the pendency of the appeal, Labhu Ram, one of the respondents, died. The High Court, holding that the appeal abated against Labhu Ram and that its effect was that the appeal against Nathu Ram also abated, dismissed the appeal. It also dismissed the cross-objections. The State Government applied for a certificate of fitness of the case for appeal to this Court and the High Court granted it, as questions of great private and public importance were involved.

It is not disputed that in view of Order 22, rule 4, Civil Procedure Code, hereinafter called the Code, the appeal abated against Labhu Ram, deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the co-respondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the cases. Suffice it to say that when Order 22, rule 4, does not provide for the abatement of the appeals against the co-respondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

The same conclusion is to be drawn from the provisions of Order 1, rule 9, of the Code which provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (*a*) when the success of the appeals may lead to the Cour'’s coming to a decision which would be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent ; (*b*) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (*c*) when the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed.

There has been no divergence between the Courts about the Court's proceeding with the appeal between the respondents other than the deceased respondent, when the decree in appeal was not a joint decree in favour of all the respondents. The abatement of the appeal against the deceased respondent, in such a case, would make the decree in his favour alone final, and this can, in no circumstances have a repercussion on the decision of the controversy between the appellant and the other decree-holders or on the execution of the ultimate decree between them.

The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject-matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree-holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken.

It is therefore necessary to determine, on the facts of this case, whether the State appeal could proceed against Nathu Ram. The award of the arbitrator in each of

these cases was a joint one, in favour of both the respondents Labhu Ram and Nathu Ram. To illustrate the form of the award, we may quote the award for the year 1945-46 in the proceedings leading to Civil Appeal No. 635 of 1957. It is :

> " On the basis of the report of S. Lal Singh, Naib Tehsildar (Exhibit P.W. 9/1) and Sheikh Aziz Din, Tehsildar, Exhibit P.W. 9/2, the applicants are entitled to a sum of Rs. 4,140 on account of rent, plus Rs. 3,872-8-0 on account of Income-tax, etc., due to the inclusion of Rs. 6,193-8-0 in their total income, plus such sum as the petitioners have to pay to the Income-tax Department on account of the inclusion of Rs. 4,140 in their income as awarded by this award."

The result of the abatement of the appeal against Labhu Ram is therefore that his legal representatives are entitled to get compensation on the basis of this award even if they are to be paid separately on calculating their rightful share in the land acquired, for which this compensation is decreed. Such calculation is foreign to the appeal between the State of Punjab and Nathu Ram. The decree in the appeal will have to determine not what Nathu Ram's share in this compensation is, but what is the correct amount of compensation with respect to the land acquired for which this compensation has been awarded by the arbitrator. The subject-matter for which the compensation is to be calculated is one and the same. There cannot be different assessments of the amounts of compensation for the same parcel of land. The appeal before the High Court was an appeal against a decree jointly in favour of Labhu Ram and Nathu Ram. The appeal against Nathu Ram alone cannot be held to be properly constituted when the appeal against Labhu Ram had abated. . To get rid of the joint decree, it was essential for the appellant, the State of Punjab, to implead both the joint-decree holders in the appeal. In the absence of one joint-decree holder, the appeal is not properly framed. It follows that the State appeal against Nathu Ram alone cannot proceed.

It is however contended for the State that according to the entries in the village records, Labhu Ram and Nathu Ram had equal shares in the land acquired and that therefore the appeal against Nathu Ram alone can deal with half the amount of the award. We do not agree. The mere record of specific shares in the revenue records is no guarantee of their correctness. The appellate Court will have to determine the share of Nathu Ram and necessarily the share of Labhu Ram in the absence of his legal representatives. This is not permissible in law. Further, the entire case of Labhu Ram and Nathu Ram, in their application to the Government for the appointment of an arbitrator, was that the land jointly belonged to them and had been acquired for military purposes, that a certain amount had been paid to them as compensation, that they received that amount under protest and that they were entitled to a larger amount mentioned in the application and also for the income tax they would have to pay on account of the compensation received being added to their income. Their claim was a joint claim based on the allegation that the land belonged to them jointly. The award and the joint decree are on this basis and the appellate Court cannot decide on the basis of the separate shares.

The State objected before the arbitrator, and urges before us, that under the rules, the joint application of Labhu Ram andNathu Ram should have been treated as separate applications with respect to the correctness of the compensation payable to each of them respectively and that the arbitrator should have made separate awards with respect to such separate claims of Labhu Ram and Nathu Ram. The necessary corollary of such a contention for the State is that the abatement of the appeal against Labhu Ram will not make infructuous the appeal against Nathu Ram.

The respondent urges that the Punjab Land Acquisition (Defence of India) Rules, do not contemplate separate applications by the persons interested in the compensation on account of the acquisition of a particular parcel of land.

The arbitrator did not agree to deal with the claims of Labhu Ram and Nathu Ram separately. He, however, did not decide the question on the basis of the land belonging jointly to the two brothers as members of the joint Hindu family. He however held that the expression 'a person interested' in rule 3, included all persons claiming an interest in the compensation to be paid on account of the acquisition of the land and that rule 18 permitted the joinder of applications for joint enquiry when

each case rested on the same and similar basis and each of the applications included land included in a larger part of land acquired at one time. He also took into consideration that the separation of the application of Labhu Ram and Nathu Ram would involve various difficulties in matters of income-tax. He therefore used his discretion and ordered the application to be proceeded with jointly.

In view of our opinion on the main point, we do not consider it necessary to interpret the rules and decide whether the joint application was maintainable or not. The fact remains that Labhu Ram and Nathu Ram made a joint claim and got a joint decree against the State for compensation. The frame of the appeal is to be with reference to the nature of the decree challenged.

We therefore see no force in this appeal and dismiss it with costs. This order will govern the other connected appeals, *viz.*, Civil Appeals Nos. 636 to 641 of 1957.

Appeals dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Patneedi Rudrayya .. *Appellant**

v.

Velugubantla Venkayya and others .. *Respondents.*

Easements Act (V of 1882), *section* 7, Illustration (i)—*Right based on—Obstruction—Liability.*

Tort—Right by immemorial user claimed by plaintiff to drain surface water into adjoining lower fields belonging to defendants—Defendants putting up bunds and digging trenches in their fields thereby obstructing the flow of water along natural direction—Right of Plaintiff to have mandatory injunction against defendants.

Where the owners of the lower grounds by erecting an embankment impedes the natural flow of water along its natural direction from a higher ground they would be obstructing the natural outlet for that water. It makes little difference that the water happens to be not merely rain water but flood water, provided the flood is of the kind to which the higher land is subjected periodically.

Where a right is based upon the *Illustration* (i) to section 7 of the Indian Easements Act, the owner of higher land can pass even flood water received by him on to the lower land, at any rate where the flood is a usual or periodic occurrence in the locality. There is no general right to fight surface water as a common enemy.

Accordingly the bunds erected and trenches dug by the defendants (owners of adjoining lower fields) must be held to constitute a wrongful act entitling the plaintiff (owner of the higher field) claiming a right by immemorial user of draining water into defendants' fields, to the grant of a mandatory injunction against the defendants.

Appeal by Special Leave from the Judgment and Decree dated the 18th day of December, 1953, of the Madras High Court in Second Appeal No. 24 of 1949.

K. Bhimasankaram, Senior Advocate (*T. V. R. Tatachari*, Advocate with him, for Appellant.

K. R. Chaudhuri, Advocate, for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave from the Judgment of the Madras High Court in a Second Appeal reversing the decrees of the two Courts below.

The plaintiff who is the appellant before us is the owner of survey No. 159 of the village Vemulavada while defendants 1 and 2 are owners of survey No. 158 lying to the north of survey No. 159 and adjoining. The defendant No. 3 is the owner of a field lying to the north of survey No. 158. To the south of survey No. 159 is survey No. 160 belonging to the brother of the plaintiff. Immediately beyond this field and to the south are a " parallel drain ", into which flow the waters of the Vakada drain, and Tulyabhaga drain both running west to east. It would appear that the parallel drain is an artificial drain while the Tulyabhaga is a natural drain. The

* Civil Appeal No. 2 of 1958. 10th April, 1961.

parallel drain ends abruptly at the eastern end of survey No. 150 at a distance of about two furlongs or so to the east of survey No. 160.

According to the plaintiff rain water falling on survey Nos. 160 and 159 flows in the northern direction over survey No. 158 and then enters into a drain shown in the map and indicated by the letters EE. In normal times the water in this drain flows towards the south and empties itself in the Tulyabhaga drain. Sometime before the institution of the suit the defendants 1 and 2 constructed a bund running approximately east-west on their own land. Its height, according to the Commissioner, varies between 3′ and 8′ and its width is about 16′. Its length is reported by the Commissioner to be 1580′. Apparently the bund is not a continuous one and there are a few gaps in it. About 5′ to the south of the bund the defendants had dug several trenches 15′ in width and between 2′ and 4′ in depth. These trenches run along a foot-path which separates the fields of the parties. The plaintiff's grievance is that as a result of what the defendants 1 and 2 have done flood water flowing from his field in the northerly direction cannot find an outlet and stagnates on his land thus doing damage to his crops. Further, according to him as a result of the digging of the pits the level of his land adjoining the footpath is gradually decreasing with the result that the top soil of his field is being washed away. He, therefore, sought a mandatory injunction directing the defendants to fill up the trenches and demolish the bunds raised by them. The plaintiff claims the right of drainage of all water falling on or invading his land including flood water on the basis of immemorial user.

The defence of the first two defendants was that the land actually slopes from north to south, that rain water and flood water naturally flow from the north to the south and that the plaintiff's grievance is wholly imaginary. They deny the existence of immemorial user upon which the plaintiff rested his case. They admitted that flood waters do stagnate on the plaintiff's land. This, according to them, was a result of the closing of some vents in the Vakada drain by the ryots of that village as a result of which the water collected in that drain during heavy rains cannot find its natural outlet and floods the lands of a number of people including the plaintiff. The bund erected by the defendants was, according to them to protect their lands from being inundated by the flood waters of the Vakada drain and that it was open to the plaintiff to do likewise by constructing dams at appropriate places in his field and thus keep back the flood waters of the Vakada drain.

Both the Courts below arrived at the following findings of fact :

(1) The land dips in the northerly direction.

(2) That a number of fields including fields Nos. 158, 159 and 160 lie in a sort of a basin with elevations along the eastern and western boundaries into which drainage and rain water from all sides tends to accumulate.

(3) Ordinarily the surplus water from lands adjacent to the basin as well as rain water falling on the land in the basin in drained off from north and then finds its way in the drainage channel EE which runs north-south and drains it into the Tulyabhaga drain.

(4) Whenever due to heavy rain Tulyabhaga drain is in spate the flood water which collects in the basin cannot flow through the channel EE and flows in the northerly direction towards another channel called Kongodu channel and that this is what has been happening from time immemorial.

(5) Whenever there is heavy rain the Vekada drain swells up and water therefrom floods survey Nos. 153 to 160.

(6) That this has been happening since time immemorial and that the defendant's contention that this is because of something done in recent times is not correct.

(7) That the inundation of the appellant's land in the further flow of water northwards is not unusual, abnormal or occasional due to extraordinary floods but is an event which occurs every year in the usual course of nature.

The High Court, however, came to the conclusion that the flooding of fields Nos. 153 to 160 because of the swelling of the Vakada drain is not something which has been happening from time immemorial but only subsequent to the year 1924, that the flooding of these lands was not a usual and natural phenomenon but something unusual and that water being a common enemy of all, the defendants 1 and

2 were within their rights in constructing the bunds and digging trenches. According to the High Court the plaintiff had no right to prevent the defendants from taking the steps that they are taking and that a custom to allow flood water to flow over the neighbour's land has not been so far established.

We may mention here that the High Court had actually called for certain additional findings from the appellate Court and one of the questions raised was whether there was an immemorial user as contended by the plaintiff to let out Vakada drainage water beyond certain points. In coming to the conclusion that the plaintiff has not been able to establish immemorial user in respect of the right claimed by him of draining of flood waters from his field on to the defendants the High Court has ignored the clear finding of the lower appellate Court on the point. We find that there is no justification for the course adopted by the High Court.

In paragraph 17 of its judgment it has observed as follows :

> " It is well established on the evidence that from time immemorial flood water, as well as the surplus water, and the water from Vakada and Vemulavada, all collect and flow northwards through the cradle or basin in which the suit lands are situate, when the level of the water in Tulyabhaga is such as not to admit the flow of such water into it. It has been customary from time immemorial for the said water, under such circumstances, to go northwards from the plaintiff's fields onwards over the defendants' fields, and the further fields beyond."

After remand the lower appellate Court reiterated its conclusion and observed as follows in paragraph 14 of its findings :

> " On the evidence on record and for the reasons I have given above I am of opinion that the oral evidence either way is inadequate, but on such little evidence as available and on the probabilities of the case and relying upon the evidence of P.W. 4 and the clear indication of the existence of local drain Exhibit P.4 , I would find that the Vekada drain water should have been getting into parallel drain and through EE and F into Tulyabhaga drain for a considerably long period of time at least from somewhere about the year 1920. "

Earlier in its order the lower appellate Court has observed :

> " In my opinion the parallel drain should have existend at least from the year 1924, if not many years before that. "

It would thus be clear that even in the revised finding the appellate Court has not been able to fix the precise year of commencement of the phenomenon. It would, therefore, follow that upon the evidence available in this case the proper inference to be drawn would be that this phenomenon has been known from time immemorial. A phenomenon is said to be happening from time immemorial when the date of its commencement is not within the memory of man or the date of its commencement is shrouded in the mists of antiquity. No doubt the lower appellate Court has referred to the years 1920 and 1924 in its finding but it has not said that the phenomenon was observed for the first time in 1924 or even in 1920. It has made it quite clear that the phenomenon was known to be happening in these years and that it must have been happening for many years prior to that.

The basis of the plaintiff's claim is not the natural right of the owner of higher land to drain off water falling on his land on to lower lands but the basis is that this right was being exercised with respect to the land of the defendants 1 and 2 from time immemorial. The finding of fact of the lower appellate Court being in his favour on this point his suit must succeed.

The High Court, following certain English decisions, came to the conclusion that water being the common enemy, every owner of land had a right to protect himself against it and in particular to protect himself from the ravages of such unusual phenomenon as floods. Some of the cases upon which the High Court has relied deal with the rights of riparian owners and are thus not strictly appropriate.

The High Court seems to be of the opinion that the floods, as a result of which the plaintiff and the defendants suffer damage, are an unusual phenomenon. Here again, the High Court has gone wrong because the lower appellate Court has found that these floods were a usual occurrence. Where a right is based upon the *Illustration* (i) to section 7 of the Indian Easements Act, 1882 (V of 1882), the owner o

higher land can pass even flood water received by him on to the lower land, at any rate where the flood is a usual or a periodic occurrence in the locality. The High Court has quoted a passage from Coulson and Forbes on Waters and Land Drainage[1] and a passage from the judgment in *Nield* v. *London & North Western Railway*[2], in support of its conclusions. In the passage in Coulson and Forbes it is stated that the owner of land must not take active steps to turn the flood water on to his neighbour's property. Here, the dam erected by the defendants 1 and 2 stems flood waters going from plaintiff's land down to the defendant's land and so the passage does not support the conclusion of the High Court. The decision in *Nield's case*[2] is further based on the "common enemy" doctrine. In that case also there are certain observations which would militate against the conclusion of the High Court. For instance :

> "Where, indeed, there is a natural outlet for natural water, no one has a right for his own purposes te diminish it, and if he does so he is, with some qualification perhaps, liable to any one who is injured by his act, no matter where the water which does the mischief came into the water course."

Of course, the Court in that case was dealing with water flowing along a natural water course. But the point is whether a person has a right to create an impediment in the flow of water along its natural direction. Now the water on a higher ground must by operation of the force of gravity flow on to lower ground. Where the owner of the lower ground by creating an embankment impedes the natural flow of water he would be obstructing the natural outlet for that water. It makes little difference that the water happens to be not merely rain water but flood water provided the flood is of the kind to which the higher land is subjected periodically.

In England the early extension of the common drains all over the country under the supervision of the Commissioners of Sewers has rendered a discussion on the rights of flow of surface water needless and, therefore, there are no modern decisions upon the question. But old precedents show that the common law rule appears to be the same as that under civil law. In a case arising in Guernsey[3] the Privy Council has applied the rule of civil law to that island. That this is adopted by the common law would appear from the decision in *Nelson* v. *Walker*[4].

The rule of civil law according to Domat is quoted thus at page 2586 of Waters and Water Rights, Vol. III by Farnham :

> "If waters have their course regulated from one ground to another, whether it be the nature o the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient course of the water. Thus, he who has the upper grounds cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds.........."

The learned author, after a discussion of old English cases on the point, has stated that the common law regarded the flow of rain water along natural courses as one of its doctrines and that there is no general right thereunder to fight surface water as a common enemy. The author has then observed :

> "All rightful acts with regard to it are confined within very narrow limits which have not yet been fully defined. And to state generally that such water is a common enemy, or that there is a right to fight it at common law, cannot be otherwise than misleading". (page 2590).

After discussing a number of precedents from the American State Courts he has pointed out that the common enemy doctrine is of very recent origin. He has observed at page 2591 :

> "That surface water is not a common enemy, and that there is no right to fight it according to the pleasure of the landowner, clearly appear from the principles which have already been stated."

We must, therefore, distinguish between cases pertaining to riparian lands and cases like the present. But as pointed out in *Nield's case*[2], the only right which a

1. 6th Ed., p. 191.
2. L.R. 10 Exch. 4.
3. *Gibbons* v. *Lenfestey and another*, A.I.R. 1915 P.C. 165.
4. 10 C.L.R. 560.

riparian owner may have is to protect himself against extraordinary floods. But even then he would not be entitled to impede the flow of the stream along its natural course[1]. We may repeat that the finding here is that the floods from which the defendants 1 and 2 are seeking to protect themselves are not of an extraordinary type. In the circumstances, therefore, the bund erected by them and the trenches dug up by them must be held to constitute a wrongful act entitling the plaintiff to the reliefs claimed by him. For these reasons we allow the appeal, set aside the Judgment of the High Court and restore that of the Subordinate Judge. The costs throughout will be borne by the defendants-respondents.

Appeal allowed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

P. V. Bheemsena Rao .. *Appellant**

v.

Sirigiri Pedda Yella Reddi and others .. *Respondents.*

Madras Hindu Religious Endowments Act (II of 1927) Section 44-B—Construction—If covers personal grant burdened with service.

Section 44-B (1) of the Madras Hindu Religious Endowments Act, though on a wide interpretation it might also include personal inams burdened with service, is really confined to inams directly granted to the temple or service inams for the purpose of a temple or math or inams the whole of the income of which is meant for charity and does not include personal inams burdened with service. Such inams would continue to be dealt with under Board's Standing Order 54 class (*b*) (as introduced by the amendment to that Order after the introduction of section 44-B (1) in the Act in 1934).

Appeal from the Judgment and Decree dated the 8th January, 1954 of the Madras High Court in Second Appeal No. 312 of 1949.

A. V. Viswanatha Sastri, Senior Advocate ((*T. V. R. Tatachari*, Advocate with him) for Appellant.

P. Somasundaram, Senior Advocate (*T. Satyanarayana*, Advocate, with him) for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J.—This appeal on a certificate granted by the Andhra Pradesh High Court raises the question of the interpretation of section 44-B(1) of the Madras Hindu Religious Endowments Act, No. II of 1927 (hereinafter called the Act). The point arises in this way. The property in dispute was originally granted in inam to the ancestors of the predecessors-in-interest of the plaintiffs-respondents for the performance of *parak* service in the pagodas (temples) of village Panyam in Nandyal Taluk of the Kurnool District. The grantees of the land in this inam alienated a considerable portion of it and also ceased to perform the *parak* service. In consequence, the trustees of the temples at Panyam applied to the Sub-Collector under section 44-B (2) (*a*) (i) and (ii) of the Act for the resumption of the lands and their re-grant to the temples on the ground that the holders of the inam had alienated the property and had failed to perform the service required of them. An inquiry was conducted into these allegations, and it was held by the Revenue Divisional Officer, Nandyal, that the inam had been granted on the condition of *parak* service being rendered and that there had been breach of the condition on failure to perform the service and also that the lands comprised in the inam had been alienated in a manner falling within section 44-B (2) (*a*) (i) of the Act. On these findings the resumption of the inam lands was ordered and the inam was re-granted to the temples in Panyam village. The

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1. *Menzies v. Breadalbane*, (1828) 3 Bli. (N.S.) 414.

*Civil Appeal No. 752 of 1957. 16th March, 1961.

alienees took the matter in appeal to the Collector but failed. Thereupon they filed the suit out of which the present appeal has arisen ; and their main contention was that the revenue authorities had no jurisdiction to order the resumption of the inam under section 44-B. The suitwas resisted by the trustees who were defendants to it and their case was that the inam was a religious service inam in the sense of being emoluments for the performance of service and alternatively that even if the grant was a personal inam, burdened with the performance of *parak* service, the grant was conditional on the performance of the service and as there was breach of this obligation, the resumption and re-grant were justified under section 44-B.

Certain preliminary facts are not in dispute now. It has been found by all the Courts that the inam grant comprised both the warams. It has also been found that the grant to the inamdar was personal to him though burdened with *parak* service and not a service inam in the sense of the inam constituting emoluments of any office. On the finding that the inam was a personal inam burdened with service to the temple the trial Court held that the case did not fall within section 44-B of the Act. On appeal the District Court confirmed the decree of the trial Court. In the High Court on Second Appeal the finding as to the inam being of both warams was not contested and it was conceded that it was a personal inam burdened with service. The only question that was agitated there was whether the case would fall within the four corners of section 44-B even if the inam which was granted in the present case was a personal inam of both warams burdened with service to the temple. The High Court held against the trustees and dismissed the appeal. Thereupon the trustees who are the appellants before us applied for a certificate which was granted to them ; and that is how the matter has come up before us.

Section 44-B (1) is in these terms :

> "Any exchange, gift, sale or mortgage, and any lease for a term exceeding five years, of the whole or any portion of any inam granted for the performance of a charity or service connected with a math or temple and made, confirmed or recognised by the British Government, shall be null and void."

The question for consideration is whether a personal inam burden with service to a temple can be said to come within the meaning of the words "any inam granted for the performance of a service connected with a temple". It is urged that the words used in section 44 -B (1) are of very wide import and any personal grant of land howsoever large, if it is burdened with some service to a temple howsoever small, would be within the meaning of these words and would therefore come within the terms of section 44-B (1). The High Court has repelled this wide construction of the words used in section 44-B (1), and we think rightly. The distinction between a grant for an office to be remunerated by the use of land and a grant of land burdened with service is well known in Hindu law. The former is a case of a service grant and is resumable when the service is not performed. The latter is not a service grant as such but a grant in favour of a person though burdened with service and its resumption will depend upon whether the circumstances in which the grant was made establish a condition that it was resumable if the service was not performed : (See *Shirmant Lakhamgouda Basavprabhu Sardesai* v. *Raosaheb Baswantrao* alias *Annasaheb Subedar and others*[1]). The question therefore is whether section 44-B covers only the first type of grant, (namely, a service grant) and not a personal grant burdened with service.

Prior to the introduction of section 44-B in the Act, the enforcement of a condition of a grant in favour of charitable and religious institutions in Madras was by taking recourse to Board's Standing Order 54. Under para. 1 of this Order, a duty was laid on the revenue officers to see that inams confirmed by the Inam Commissioner for the benefit of or for services to be rendered to any religious and charitable institution are not enjoyed without the terms of the grant being fulfilled. Under para. 2 thereof, religious and charitable inams were liable to be resumed on the ground that the whole or a portion of the land had been alienated or lost to the institution or ser-

1. (1931) 61 M.L.J. 449.

vice to which it once belonged or that the terms of the grant were not observed. Provision was also made in the Order for the authorities which would exercise the power to resume. Further provisions in that Order show that the intention normally was not to dispossess the inamdar even in the event of failure to perform the conditions of the grant but the land was subjected to full assesment and the assessment was made available to the institution in lieu of the service lost. In the case of personal inams burdened with service in particular what was usually resumed in the event of non-performance of service with or without alienation was that portion of the grant which represented the value of the service burdened and not that which was personal and there was no injustice in this course for as we have already said a personal inam burdened with service was granted to an individual for himself though he was required to perform certain services to the temple. Therefore, in case he failed to do so there might be resumption of such portion of the inam as would represent the burden of the service leaving the rest to him.

It is in this background that we have to examine section 44-B (1) introduced in the Act in 1934 and see whether personal inams burdened with service are included within its ambit. It may be mentioned that on the introduction of section 44-B (1) in the Act, Board's Standing Order 54 was amended and religious and charitable inams which were all governed till then by it were divided into two classes, namely—

(*a*) inams granted for the performance of a charity or service connected with a Hindu math or temple ; and

(*b*) inams not falling under class (*a*).

Inams falling under class (*a*) were to be governed by the provisions of the Act while inams falling under class (*b*) were to be governed by Board's Standing Order 54 as heretofore. This amendment would also show that all religious inams, *i.e.*, inams which had some connection howsoever slight with a temple or other religious institution were not to be governed by section 44-B and only those inams which were granted for the performance of a charity or service connected with a Hindu math or temple were to be dealt with under section 44-B while others would still be governed by Board's Standing Order 54. We therefore agree with the High Court that this history affords a clue to the interpretation of section 44-B (1) and suggests that though the words used in section 44-B are open to a wide interpretation, the intention was to bring within its purview only those inams which were granted directly to the temple and also those inams which were granted for the performance of a charity or service connected with a math or temple *i.e.*, service inams or such inams the whole income of which was for charity and not those inams which were personal inams though burdened with some service to a temple or math. As we have already said the land granted under a personal inam burdened with service may be very large and the service expected may be very slight, and it could not be the intention of the legislature when it enacted section 44-B (1) that large personal inams with slight service attached to them should be resumed and re-granted to the temple under section 44-B (1) for failure to perform the service with which the grant was burdened. It would make no difference to the validity of this argument even if the service attached absorbed a larger portion of the inam leaving only a smaller portion to the grantee.

This conclusion is in our opinion enforced if we look at clause (iii) of section 44-B 2 (*a*) which permits resumption of an inam on the ground that either the math or temple has ceased to exist or the service in question has in any way become impossible of performance. Now it could not be the intention of the legislature, where an inam was granted as a personal inam though burdened with some service to a temple or math, that such inam should be resumed simply because the math or temple has ceased to exist or for some other reason the service has become impossible of performance. The nature of a personal inam burdened with service is that it is meant for the individual to whom it is granted though the individual is required to perform some service to the temple also. The legislature could not have intended when it enacted section 44-B (2) (*a*) (iii) that even such an inam should be resumed when the math or temple ceases to exist. But this would be the result if the wide in-

terpretation contended for by the appellants is accepted. In such a case obviously the personal portion of the grant has to be separated from the service portion and if the service is not performed it is only the service portion that is liable to resumption. Further if we look at section 44-B (2) (*f*) (i), it provides that where an inam is resumed under section 44 -B (1) it shall be re-granted as an endowment to the temple or math concerned. In the case of a personal inam burdened with service it will mean that if the service is not performed the whole inam would be liable to resumption and would be regranted to the temple, though the inam was granted to an individual and the service with which it was burdened might have been slight, the remaining income of the inam being intended as a personal grant to the individual. Therefore when section 44-B (2) (*f*) (i) provides for re-grant of the resumed inam to the temple it presumes that the whole of the inam resumed was meant for service of the temple and there was no element of personal grant in it. It is on that basis that we can understand the re-grant of the resumed inam to the temple, the idea behind the word "re-grant" being that originally also it was granted for the temple though as a service inam. Similarly, section 44-B (2) (*f*) (ii) provides that where the math or temple has ceased to exist and an inam is resumed on that ground it shall be re-granted as an endowment to the Board for appropriation to such religious, educational or charitable purposes not inconsistent with the objects of such math or temple, as the Board may direct. Here again it seems to us that the Legislature could not have intended that a personal inam granted to an individual though burdened with service should be resumed when the temple has ceased to exist and the service could not be performed and should be taken over by the Board as an endowment for such purposes as the Board may direct. Such a provision would completely overlook the personal part of a personal inam burdened with serivce. Therefore, the view taken by the High Court that section 44-B (1), though on a wide interpretation it might also include personal inams burdened with service, is really confined to inams directly granted to the temple or service inams for the purpose of a temple or math or inams the whole of the income of which is meant for charity and does not include personal inams burdened with service, is correct. Such inams would continue to be dealt with under Board's Standing Order 54, class (*b*) as introduced by the amendment to that Order. In this view, there is no force in this appeal and it is hereby dismissed with costs.

Appeal dismissed.

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND RAGHUBAR DAYAL, JJ.

Singhai Ajit Kumar and another .. *Appellants**

v.

Ujayar Singh and another .. *Respondents.*

Hindu Law—Succession—Illegitimate son—Rights of—Whether an illegitimate son of a Sudra vis-a-vis *his self-acquired property, after having succeeded to a half share of his putative father's estate, is entitled to succeed to the other half share got by the widow, after the succession opened out to his putative father on the death of the said widow.*

Under the Hindu Law, the death of the widow opens inheritance to the reversioners and the nearest heir at the time to the last full owner becomes entitled to possession. When the succession opens, in the case of sudras in a competition between an illegitimate son and other reversioners the illegitimate son is certainly a nearer heir to the last male holder than the other reversioners. As, on the death of the widow, the estate reverts back to the last male holder, the succession shall be traced to him, and if so traced the illegitimate son has a preferential claim over all other reversioners. The decision in *Karuppayee Ammal* v. *Ramaswami*, (1932) 62 M.L.J. 698 : I.L.R. 55 Mad. 856 cannot be invoked in support of the contention that in a case where the doctrine of reverter applies the illegitimate son is excluded from succession. However the Nagpur High Court in *Bhagwantrao* v. *Punjaram*, I.L.R. (1938) Nag. 255, rightly came to the conclusion that where on a partition between a legitimate and an illegitimate son, the widow was allotted a share, on her death the illegitimate son was entitled to a share in the property. Hence, on the death of the widow (in

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* C.A. No. 462 of 1957. 16th March, 1961.

the instant case) the illegitimate son succeeded to the other half share of the estate of his putative father.

Appeal by Special Leave from the Judgment and Decree dated the 18th April, 1952, of the former Nagpur High Court, in First Appeal No. 88 of 1942.

C. B. Agarwala, Senior Advocate (*K. P. Gupta*, Advocate, with him), for Appellant No. 1.

Har Dayal Hardy and *N. N. Keswani*, Advocates, for Respondent No. 1.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is directed against the judgment and decree of the High Court of Judicature at Nagpur confirming the judgment of the Second Aditional District Judge, Jabalpur, in Civil Suit No. 9-A of 1942 filed by respondents 2 to 7 herein claiming to be the reversioners of the Estate of one Raja Ajit Singh. Ajit Singh was the Raja of Saliya Estate consisting of 73 villages and other property situate in Jabalpur and Saugor Districts. Ajit Singh died on January 2, 1910, leaing behind him two widows named Rani Khuman Kuar and Rani Anant Kuar and an illegitimate son named Ramraghuraj Singh. Rani Anant Kuar died in or about 1914 and Rani Khuman Kuar passed away on February 1, 1922. After the death of Raja Ajit Singh, the Estate was taken over by the Court of Wards on behalf of the widows in the year 1913 and remained in its possession till March 27, 1923. After the death of Rani Khuman Kuar, the local Government issued a notification recognizing Ramraghuraj Singh as the successor to the Estate ; but, for one reason or other , the Court of Wards continued to manage the Estate on his behalf from September 23, 1923. Ramraghuraj Singh died on April 23, 1932, and on his death the first respondent, the son of Ramraghuraj Singh was declared as the ward of the Court of Wards which continued to manage the Estate on his behalf. Respondents 2 to 6, claiming to be the reversioners to the Estate of Raja Ajit Singh, filed a suit on June 15, 1935. for recovery of possession of the Estate. Appellants 1 and 2 are alleged to be the assignees *pendente lite* of the interest of the alleged reversioners.

The plaintiffs averred that Ramraghuraj Singh was the son of one Jhutti by her husband one Sukhai and that as Raja Ajit Singh had no issue, he and the Ranies treated the boy as their son, that the Lodhi community to which Raja Ajit Singh belonged was not a Sudra caste and that, therefore, even if Ramraghuraj Singh was the illegitimate son of Raja Ajit, Singh, he was not entitled to a share, and that in any view half of the share of the widows in the Estate would devolve, on their death, on the reversioners to the exclusion of the illegitimate son. They further pleaded that the possession of the Court of Wards of the entire Estate from 2nd January, 1910 to 1st February, 1922 was adverse to the illegitimate son and, therefore, he lost his title, if any, to the said Estate. The case of the first respondent was that Raja Ajit Singh belonged to the Sudra caste, that Ramraghuraj Singh was the son of the said Raja by a continuously and exclusively kept concubine named Raj Dulari, that the widows never questioned the right of Ramraghuraj Singh to a share.in the property of Raja Ajit Singh, that therefore there was no scope for the plea of adverse possession, and that, after the death of the widows, the succession to the Estate of Raja Ajit Singh in respect of one half share opened out and the illegitimate son, he being the nearest heir, succeeded to that share also.

The trial Court as well as the High Court concurrently gave the following findings : (1) Raja Ajit Singh belonged to the Sudra caste ; (2) Ramraghuraj Singh was the son of Raja Ajit Singh by a continuously and exclusively kept concubine by name Raj Dulari, who had passed into the concubinage of Raja Ajit Singh after the death of her husband ; (3) as the illegitimate son of Raja Ajit Singh, Ramraghuraj Singh succeeded to a moiety of the Estate of his putative father and the two widows of Raja Ajit Singh succeeded to the other moiety of his Estate ; (4) as there was no daughter or daughter's son, after the death of the widows, Ramraghuraj Singh, being the sole surviving heir of his putative father, inherited a moiety of the Estate which was held by the widows during their lifetime ; (5)

Ramraghuraj Singh was all along in joint possession of the Estate with the widow and although the Court of Wards had assumed superintendence on behalf of the Ranies, he was not out of possession during their lifetime and as such his title could not be extinguished by adverse possession ; (6) the plaintiffs' suit was barred under section 26 of the Central Provinces Court of Wards Act ; and (7) the plaintiffs' claim was barred by limitation.

While the trial Court held that it had not been established that the plaintiffs were the reversioners of Raja Ajit Singh, the High Court held that it had been proved. In the result the trial Court dismissed the suit and, on appeal, the High Court confirmed it.

The second appellant died and his legal representatives were not brought on record and the appeal so far as the second appellant is concerned has abated. The first appellant alone proceeded with the appeal.

It is the usual practice of this Court to accept the concurrent findings of the Courts below. There are no exceptional circumstances in this case, at any rate none was brought to our notice, to compel us to depart from the usual practice. We, therefore, accept the concurrent findings, namely, that Raja Ajit Singh was a member of the Sudra caste and that Ramraghuraj Singh was the son of Raja Ajit Singh by a continuously and exclusively kept concubine named Raj Dulari, who passed into his concubinage after the death of her husband.

The main question that arises in this appeal is whether an illegitimate son of a Sudra *vis a vis* his self-acquired property, after having succeeded to a half share of his putative father's estate will be entitled to succeed to the other half share got by the widow, after the succession opened out to his putative father on the death of the said widow. The answer to the question depends upon the content of the right of an illegitimate son to succeed to the self-acquired property of his putative father. The source of his right is found in the relevant Hindu Law texts. *Mitakshara*, in explanation of the texts of Manu and Yajnavalkya says in Chapter 1, section 12 in the following three verses thus :

" 1. The author next delivers a special rule concerning the partition of a Sudra's goods. 'Even a son begotton by a Sudra on a female slave may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share : and one, who has no brothers, may inherit the whole property, in default of daughter's sons.'

2. The son, begotten by a Sudra on a female slave, obtains a share by the father's choice or at his pleasure. But, after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share : that is, let them give him half as much as is the amount of one brother's allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of the female slave participates for half a share only.

3. From the mention of a Sudra in this place it follows that the son begotten by a man of a regenerate tribe on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise. But, if he be docile, he receives a simple maintenance."

No mention of a widow is found in the above verses, but in Dattaka Chandrika, the author says in v. 30, 31 thus :

" If any, even in the series of heirs down to the daughter's son, exist, the son by a female slave does not take the whole estate, but on the contrary shares equally with such heir."

The leading decision on the rights of an illegitimate son is that of the Judicial Committee in *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*[1]. There, one Raja died leaving behind him a legitimate son and an illegitimate son. On the death of the legitimate son, who had succeeded to the Raja, it was held that the illegitimate son succeeded to him by survivorship. Sir Richard Couch cited two verses from Mitakshara Chapter I, section 12. We have already extracted the said verses. Commenting upon these verses, the learned judge observed at page 132 thus :

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1. (1890) L.R. 17 I.A. 128 : I.L.R. 18 Cal. 128.

"Now it is observable that the first verse shows that during the lifetime of the father the law leaves the son to take a share by his father's choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that 'if the father be dead the brethren should make him partaker of the moiety of a share'. So in the second verse the words are that the brothers are to allow him to participate for half a share, and later on there is the same expression : 'The son of the female slave participates for half a share only.'"

On that interpretation, he accepted the view of the Bombay High Court and held that an illegitimate son and a legitimate son, being members of an undivided Hindu family governed by Mitakshara, the illegitimate son becomes entitled to the whole of the immoveable property of the family if the legitimate son dies without any male issue. The Judicial Committee again considered the rights of an illegitimate son in *Kamulammal* v. *Visvanathaswami Naicker*[1]. There it was held that in a competetion between a widow and an illegitimate son to the property of his putative father, the illegitimate son takes half of the property and the widow the other half. Sir Lawrence Jenkins observed at page 37 thus :

"Here the contest is between the illegitmate son and the widow, and though the widow is not named in the text it is well-settled that as a preferential heir to the daughter's son she is included among those who share with the illegitimate son, and it would serve no useful purpose to speculate why she was not mentioned in the test."

The status of the illegitimate son was subject of further scrutiny by the Privy Council in *Vellaiyappa Chetti* v. *Natarajan*[2]. There the question arose in the context of an illegitimate son's right to maintenance from a joint family property after the death of his father who left no separate property. The Judicial Committee held that he was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom the father was joint. In dealing with the question of status of an illegitimate son, Sir Dinshah Mulla, speaking for the Court, after considering the relevant Hindu Law texts and decisions, arrived at the following conclusion at page 15 :

"On a consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family ; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son ; ...."

It is not necessary to multiply decisions. The law pertaining to the right of inheritance of an illegitimate son to his putative father's self-acquired property may be stated thus : An illegitimate son has the status of a son under the Hindu Law and he is a member of the family. But his rights are limited compared to those of a son born in wedlock. He has no right by birth and, therefore, he cannot demand partition during his father's lifetime. During the lifetime of his father, the law allows the illetigimate son to take only such share as his father may give him. But on his father's death, he takes his father's self-acquired property along with the legitimate son and in case the legitimate son dies, he takes the entire property by survivorship. Even if there is no legitimate son, the illegitimate son would be entitled to a moiety of his father's estate when there is a widow, daughter or daughter's son of the last male holder. In the absence of any one of the three heirs, he succeeds to the entire estate of his father. From the premises it follows that an illegitimate son, except to the extent circumscribed by the Hindu Law texts, has the status of a son and is heir to the self-acquired property of his putative father. If that be his undoubted right under the Hindu Law, on what principle can he be deprived of his right of succession to the other moiety of his father's property after the death of the widow? Under the Hindu Law, the death of the widow opens inheritance to the reversioners and the nearest heir at the time to the last full owner becomes entitled to possession. When the succession opens, in a competition between an illegitimate son and other reversioners, the illegitimate son is certainly a nearer heir to the last male holder than the other reversioners. If he was the nearest heir only yielding half a share to the widow at the time of the death of his putative father, how does he cease to

1. (1922) 44 M.L.J. 465 : L.R. 50 I.A. 32 : I.L.R. 46 Mad. 167.

2. (1931) 61 M.L.J. 522 : L.R. 58 I.A. 402 : I.L.R. 55 Mad. 1. (P.C.).

be one by the intervention of the widow's estate? As on the death of the widow the estate reverts back to the last male holder, the succession shall be traced to him, and, if so traced, the illegitimate son has a preferential claim over all other reversioners. In Mayne's Hindu Law, 11th edition, this position has been controverted in the following manner at page 637:

> "The illegitimate son, though he inherits on the death of his putative father, along with or in default of male issue, widow or daughter, cannot come in as a reversionary heir on the death of the widow or daughter, as he is undoubtedly neither a sagotra nor a bhinnagotra sapinda of the last male-holder within the text of Manu."

We regret our inability to accept this proposition, for, if accepted, we would be speaking in two voices. Once it is established that for the purpose of succession an illegitimate son of a Sudra has the status of a son and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son and to a share along with them, we cannot see any escape from the consequential and logical position that he shall be entitled to succeed to the other half share when succession opens after the widow's death. The intervention of the widow only postpones the opening of succession to the extent of half-share but it cannot divert the succession through a different channel, for she cannot constitute herself a new stock of descent. The opinion expressed in Mayne's Hindu Law is sought to be supported by the author by reference to a decision of the Madras High Court in *Karuppayee Ammal* v. *Ramaswami*[1]. But a reference to that judgment shows that no such proposition has been laid down therein. There the facts were that on the death of a Sudra, the last male owner of an estate, his widow succeeded to a moiety thereof and his illegitimate son to the other moiety; the widow then died leaving behind her a son of the daughter of the last male owner and the illegitimate son above mentioned. The Madras High Court held that the daughter's son was entitled to the moiety that had vested in the widow and the illegitimate son was not entitled to any portion thereof. The reason for that conclusion is found at page 868 and it is:

> "The principle underlying the doctrine of reverter referred to is that the last male-holder's estate is inherited by females who have no free right of alienation and who hold a peculiar kind of estate called "woman's estate" and on whose death the then heir of the last male-holder succeeds to the last male-holder's estate. From its very nature, the doctrine could not apply legitimately to a case where the last male-holder's estate vested on his death not in a female heir but in a male heir also. In such a case, the doctrine as such would not strictly apply, nor has it been, so far as we are aware, applied to such a case."

The reason of the decision is therefore clear and that is when a daughter's son succeeds to an estate, there is no further scope for the application of the doctrine of reverter. The learned Judges expressly left open the present question when they said,

> "We are not now concerned with the question as to what would become of the property if the last of the daughters died without leaving a daughter's son, in such circumstances."

This decision cannot, therefore, be invoked in support of the contention that in a case where the doctrine of reverter applies the illegitimate son is excluded from succession. On the other hand, the Nagpur High Court in *Bhagwantrao* v. *Punjaram*[2] rightly came to the conclusion that where on a partition between a legitimate and an illegitimate son, the widow was allotted a share, on her death the illegitimate son was entitled to a share in the property. We, therefore, hold that on the death of the widow, the illegitimate son, the father of the first respondent herein, succeeded to the other half share of the estate of his putative father Raja Ajit Singh.

It is next contended that the widows acquired an absolute interest in the estate of Raja Ajit Singh by adverse possession and, therefore, the property would devolve not on Raja Ajit Singh's heirs but on the heirs of the widows. On the question of adverse possession also, both the Courts below have held against the appellant. But learned counsel argued that in the circumstances of this case the said finding was a mixed question of fact and law. It was said that the Courts below missed

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1. (1932) 62 M.L.J. 698 : I.L.R. 55 Mad. 856. 2. I.L.R. (1938) Nag. 255.

the point that the Court of Wards, representing the widows, held the Estate adversely to Ramraghuraj Singh in respect of his half share and, therefore, the fact that during its management the widows did not deny the title of Ramraghuraj Singh or the fact that they admitted his title could not affect the question of adverse possession. Assuming that learned counsel for the appellant was correct in his contention, we fail to see how the said legal position would advance the appellant's case, for the Court of Wards admittedly managed only the widows' limited estate and it is not the case of the appellant that the Court of Wards acquired on behalf of the widows an absolute interest in respect of the half share of Ramraghuraj Singh in the suit properties. The plaintiffs themselves claimed to be reversioners of Raja Ajit Singh on the ground that the succession to him opened out when the widows died ; and if their contention be accepted, namely, that the widows acquired an absolute interest in half of the property, they would be non-suited in respect thereof on the simple ground that their suit was not to recover the property as the heirs of the widows. But, as we have pointed out, the widows would have acquired a title by adverse possession in respect of the share of Ramraghuraj Singh only in their capacity as owners of a limited estate, *i.e.*, in regard to their half share they held it as widow's estate and in respect of the other half share of Ramraghuraj Singh they acquired a right by adverse possession only a limited estate therein. The result would be, when the widows died the succession to the estate of Raja Ajit Singh would open out and illegitimate son, as the nearest heir, would succeed to the entire estate. We, therefore, reject this contention.

In the result, the appeal fails and is dismissed. The respondent will not get any costs as the Advocate for the respondent is absent in the Court when the judgment is being delivered.

K.L.B. *Appeal dismissed.*

SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. R. MUDHOLKAR AND T. L. VENKATARAMA AIYAR, JJ.

The State of Andhra Pradesh .. *Appellant* *

v.

Kandimalla Subbaiah and another .. *Respondents.*

Penal Code (XLV of 1860), *sections* 120-B, 420, 462, 464, 466, 467 *and* 471—*Prevention of Corruption Act (II of* 1947), *sections* 5 (1) (c), 5 (1) (d) *and* 5 (2)—*Analogy between conspiracy and abetment.*

Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between sections 120-B and 109 of the Penal Code (XLV of 1860). There may be an element of abetment in a conspiracy, but conspiracy is some thing more than an abetment. Offences created by sections 109 and 120-B of the Code are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with the offence of conspiracy to commit those offences.

S. Swaminatham v. *State of Madras*, A.I.R. 1957 S.C. 340, referred to.

Appeal by Special Leave from the Judgment and Order, dated the 18th April, 1958, of the Andhra Pradesh High Court in Criminal Misc. Petition No. 1421 of 1957.†

H. J. Umrigar and *T. M. Sen*, Advocates, for Appellant.

The Judgment of the Court was delivered by

Mudholkar, J.—The State of Andhra Pradesh has come up in appeal against order passed in revision by the High Court of Andhra Pradesh quashing the charges

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* Cr. A. No. 109 of 1960. 8th March, 1961.

† (1958) 2 An. W.R. 523 : 1958 M.L.J. (Crl.) 882.

framed against nine persons by Mr. Syed Firasath Hussain, Special Judge, Vijayawada. The revision petition was preferred by only two of those persons.

The accused No. 1 Parthasarathi, who was a Lower Division Clerk in the Central Excise Circle Office at Narasaraopet was in charge of the T.P. I Permit Books (transport permit) intended for issue to Central Excise Officers for granting permits to persons applying *bona fide* for licences to transport tobacco. According to the prosecution two of those books containing 25 permit forms each were found missing from the aforesaid office. The allegation is that Parthasarathi sold those books to the remaining accused for a consideration of Rs. 400. It was found during the investigation that seven permit forms from out of these books had been used for transport of non-duty paid tobacco after blanks in those forms had been filled and the signatures of certain Central Excise Officers forged on them. Further, according to the prosecution, accused Nos. 2 to 8 got authorisation letters prepared with the help of accused No. 9 by forging the signatures of the supposed consignors of the tobacco. With the help of these documents the accused Nos. 2 to 8 are said to have transported tobacco to the licensed premises of certain persons and received payments for the tobacco delivered to them.

The prosecution alleged that all this was done by all the accused by entering into a conspiracy, the object of which was to procure and utilise blank T. P. I Forms, fill them in, forge the signatures of Central Excise Officers and use them as genuine for the purpose of transporting tobacco without paying duty upon it. The charge-sheet states that the accused Nos. 1 to 9 have committed the offence under section 120-B, Indian Penal Code, read with section 5 (2) of Prevention of Corruption Act, 1947 (II of 1947). It further states that the accused No. 1 had committed offences under section 5 (1) (*c*) and 5 (1) (*d*) of Prevention of Corruption Act, 1947, as also offences under sections 462, 463 and 464, Indian Penal Code. The accused Nos. 2 to 8 are said to have abetted all these offences. Each of these accused is in addition said to have committed offences under section 420, Indian Penal Code.

The Subordinate Judge, Vijayawada, was appointed as Special Judge under the provisions of section 6 of the Criminal Law (Amendment) Act, 1952 (II of 1952), to try offences under the Prevention of Corruption Act, 1947. He framed the following charges :

"*Charge No. I.*—That you, accused 1 to 9 on or about 19th September, 1953 to 5th November, 1953 agreed to do by illegal means to wit, A-1 being a public servant in the Central Excise Department dishonestly sold two blank T.P.I. Books for Rs. 350 to one late Jogayya and obtained pecuniary advantage for himself and A-2 to A-8 and that A-9 forged 7 T.P.I. Forms, out of the above two books, which forged T.P.Is. were used by A-2, A-3, A-5, A-7, A-8 with the assistance of A-4 and A-6 and cheated the merchants of Markapur and Cumbum by using the said forged T. P.Is for the above purpose of cheating ; and that the above acts were done by all of you in pursuance of a conspiracy and that thereby you A-1 have committed an offence punishable under section 120-B of the Indian Penal Code read with section 5 (1) (*c*) and (*d*) punishable under section 5 (2) of the Prevention of Corruption Act and also under section 109, Indian Penal Code, read with sections 420, 466 and 467 of the Indian Penal Code and that you, A-2 to A-9 under section 120-B read with section 5 (1) (*c*) and (*d*) punishable under section 5 (2) of Act (II of 1947) and sections 420, 466 and 467 and 471, Indian Penal Code and within my cognizance.

Charge No. II.—That you A-1, being a public servant in the Central Excise Department, being a Lower Division Clerk in the office of the Superintendent of Central Excise, Narasaraopet Circle, since 1951 and in such capacity were entrusted since 1951 with blank T.P.I. Books, dishonestly sold two of the above said T.P.I. Books under your control to one late Jogayya for Rs. 350, in or about the month of April, 1953, and dishonestly, fraudulently misappropriated the said amount and thereby committed the offence of misconduct punishable under section 5 (2) read with section 5 (1) (*c*) of the Prevention of Corruption Act (II of 1947), and within my cognizance.

Charge No. III.—That you A-1, in the above capacity, by corrupt and illegal means, and by abusing your position as a public servant, obtained for yourself an amount of Rs. 350 being the sale proceeds of the two Blank T.P.I. Books, from one late Jogayya and obtained for A-2 to A-8, a pecuniary advantage of Rs. 10,120-14-0, the amount of revenue due to the Central Government and thereby committed the offence of criminal misconduct punishable under section 5 (2) read with section 5 (1) (*d*) of the Prevention of Corruption Act (II of 1947) and within my cognizance.

Charge No. IV.—That you, A-9, on or about the days between September and November, 1953, forged 7 blank T.P.Is. Nos. 610432, 610443, 610460, 610448, 61044, 610468, 610446 as if they are documents to have been made by the Central Excise Officials in their official capacity by filling up the

same with false particulars and fixing the signatures of different Central Excise Officials so as to show that they are genuine T.P.I. permits that you thereby committed an offence punishable under section 466, Indian Penal Code and within my cognizance.

Charge No. V.—That you, A-9, on or about the days between September and November, 1953, forged the 7 T.P.I. permits mentioned in Charge No. IV purporting to be valuable securities with intent and that they may be used for transporting tobacco as duty paid tobacco and that you thereby committed an offence punishable under section 467 of the Indian Penal Code and within my cognizance.

Charge No. VI.—That you, A-2 to A-8, on or about the days between 12th September, 1953 and 5th November, 1953 at Chodavaram, Satulur, Velpur and Tenali dishonestly used the above seven forged T.P.Is. mentioned in Charges No. IV as genuine, which you knew at the time you used them as forged documents and transported 26,989 lbs. non-duty paid tobacco, as duty paid tobacco by quoting the above fictitious documents as proof of payment of duty and that you thereby committed an offence punishable under sections 465 and 471 of the Indian Penal Code and within my cognizance.

Charge No. VII.—That you, A-2 to A-8, on or about the days between 19th September, 1953, and 5th November, 1953 at Cumbum and Markapur cheated (1) B. Ranga Subbayya of Cumbum, (2) P. Ch. Venkata Subbaiah and (3) Shri B. Seshaiah of Markapur and thereby dishonestly inducing them to deliver you, Rs. 10,994-10-3, which was the property of the above said persons, and that you thereby committed an offence punishable under section 420, Indian Penal Code and within my cognizance."

While seven of the accused persons were content with the charges, two preferred an application for revision before the High Court which, as already stated, accepted it and quashed the charges and directed the Special Judge to frame fresh charges on the lines indicated in the judgment.

Mr. Umrigar, who appears for the State of Andhra Pradesh, while conceding that Charge No. 1 as it stands, is involved and obscure and requires to be reframed takes exception to the observation of the High Court that the charge is bad for multiplicity. It is not quite clear what the High Court meant. If it meant that separate charges should be framed for different offences there can be no objection ; but if it meant that all these accused cannot be tried at the same trial then we have no doubt that it was in error. The High Court pointed out that this is an omnibus charge containing as many as 203 offences and that it is in direct violation of sections 234, 235 and 239 of the Code of Criminal Procedure. No doubt, sub-section (1) of section 234 provides that not more than three offences of the same kind committed by an accused person within the space of 12 months can be tried at the same trial. But then section 235 (1) provides that if in any one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. Therefore, where the alleged offences have been committed in the course of the same transaction the limitation placed by section 234 (1) cannot operate. No doubt, the offence mentioned in Charge No. 1 is alleged to have been committed not by just one person but by all the accused and the question is whether all these persons can be jointly tried in respect of all these offences. To this kind of charge section 239 would apply. This section provides that the following persons may be charged and tried together, namely :

(1) persons accused of the same offence committed in the course of the same transaction ;

(2) persons accused of an offence and persons accused of abetment or an attempt to commit such an offence ;

(3) persons accused of different offences committed in the course of the same transaction.

Clearly, therefore, all the accused persons could be tried together in respect of all the offences now comprised in Charge No. 1. We, however, agree with Mr. Umrigar that it would be desirable to split up Charge No. 1 suitably so that the accused persons will not be prejudiced in answering the charges and in defending themselves.

The learned Judge has held, following a decision of a single Judge in In re *Venkataramaiah*[1], that no charge of conspiracy is permissble for committing which

1. (1937) 2 M.L.J. 862 : A.I.R. 1938 Mad. 130, 132.

the conspiracy was entered into and which had actually been committed: In that case the learned Judge had observed as follows at page 132 :

"Where the matter has gone beyond the stage of mere conspiracy and offences are alleged to have been actually committed in pursuance thereof, these two sections are wholly irrelevant. Conspiracy, it should be borne in mind, is one form of abetment (*see* section 107, Indian Penal Code) and where an offence is alleged to have been committed by more than two persons, such of them as actually took part in the commission should be charged with the substantive offence, while those who are alleged to have abetted it by conspiracy should be charged with the offence of abetment under section 109, Indian Penal Code. The *Explanation* to section 109 makes this quite clear. An offence is said to be committed in consequence of abetment, when it is committed in pursuance of the conspiracy, and the abettor by conspiracy is made punishable (under section 109) with the punishment provided for the actual offence"

We are unable to accept this view. Conspiracy to commit an offence is itself an offence and a person can be separately charged with respect to such a conspiracy. There is no analogy between section 120-B and section 109, Indian Penal Code. There may be an element of abetment in a conspiracy ; but conspiracy is something more than an abetment. Offences created by sections 109 and 120-B, Indian Penal Code, are quite distinct and there is no warrant for limiting the prosecution to only one element of conspiracy, that is, abetment when the allegation is that what a person did was something over and above that. Where a number of offences are committed by several persons in pursuance of a conspiracy it is usual to charge them with those offences as well as with the offences of conspiracy to commit those offences. As an instance of this we may refer to the case in *S. Swaminatham* v. *State of Madras*[1]. Though the point was not argued before this Court in the way it appears to have been argued before the Madras High Court and before the High Court of Andhra Pradesh, this Court did not see anything wrong in the trial of several persons accused of offences under section 120-B and section 420, Indian Penal Code. We cannot, therefore, accept the view taken by the High Court of Andhra Pradesh that the charge of conspiracy was bad. If the alleged offences are said to have flown out of the conspiracy the appropriate form of charge would be a specific charge in respect of each of those offences along with the charge of conspiracy.

Before leaving this point we would like to refer to the decision in *R.* v. *Dawson*[2], which Mr. Umrigar very fairly brought to our notice, respondents being *ex parte.* In that case Finnemore J., who delivered the judgment of the Court observed:

"Now with regard to the first count for conspiracy..............this Court feels it is desirable to say something. This Court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a mammoth conspiracy. Several reasons have been given. First of all if there are substantive charges which can be proved, it is in general undersirable to complicate matters and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence, which otherwise would be inadmissible on the substantive charges against certain people, becomes inadmissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be well-nigh unworkable and impose a quite intolerable strain both on the Court and on the jury............"

The learned Judges in fact quashed the conviction for conspiracy in the case before them. We agree that it is not desirable to charge the accused persons with conspiracy with the ulterior object of letting in evidence which would otherwise be inadmissible and that it is undersirable to complicate a trial by introducing a large number of charges spread over a long period. But then this is only a question of propriety and it should be left to the Judge or the Magistrate trying the case to adopt the course which he thinks to be appropriate in the facts and circumstances of the case. It cannot be said as a matter of law that such a trial is prohibited by the Code of Criminal Procedure.

The High Court has further held that the learned Special Judge had no jurisdiction to try the offences under section 120-B read with sections 466, 467 and 420

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1. A.I.R. 1957 S.C. 340.

2. (1960) 1 All E.R. 558 at 563.

because he was appointed as Special Judge under the Criminal Law (Amendment) Act only for trying offences under the Prevention of Corruption Act. No doubt, he was appointed in the circumstances stated by the High Court, and therefore he will have that jurisdiction which he is competent to exercise under the Prevention of Corruption Act or the Criminal Law (Amendment) Act. Section 6 of the former provides that the State Government may appoint a Special Judge to try the following offences :

(*a*) an offence punishable under section 161, section 165 or section 165-A of the Indian Penal Code (Act XLV of 1860), or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947) ;

(*b*) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (*a*).

Sub-section (1) of section 7 provides that notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law the offences specified in sub-section (1) of section 6 shall be triable by Special Judges only.

Sub-section (3) of section 7 provides that when trying any case, a Special Judge may also try any offences other than an offence specified in section 6 with which the accused may under the Code of Criminal Procedure Code, 1898, be charged at the same trial.

Clearly, therefore, accused No. 1 could be tried by the Special Judge for offences under section 120-B read with sections 466, 467 and 420 Indian Penal Code. Similarly the other accused who are said to have abetted these offences could also be tried by the Special Judge. The view of the High Court is thus erroneous and its directions with respect to these offences are set aside.

The High Court has further held that the provisions of section 196-A (2) of the Code of Criminal Procedure have not been complied with and therefore the charges in respect of offences under sections 466 and 467 could not be enquired into by the Special Judge. Section 196-A (2) of the Code of Criminal Procedure reads thus :

" No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120-B of the Indian Penal Code,

....

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, imprisonment for life or rigorous imprisonment for a term of two years, or upwards, unless the State Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the State Government, has, by order in writing, consented to the intiation of the proceedings......"

Offences under sections 466 and 467 are admittedly non-cognizable and, therefore, it would seem from the plain language of sub-section (2) that for the offences under section 120-B read with sections 466 and 467, Indian Penal Code, the sanction of the Government will be necessary. Mr. Umrigar referred us to the decision in *Durgadas Tulsiram Sood* v. *State*[1], and said that since the object of the conspiracy was to cheat the Government, that is, to commit an offence under section 420, Indian Penal Code, and the offences under sections 466 and 467 were only means to that end, the trial was not vitiated simply because no sanction was obtained for prosecuting the accused for offences of criminal conspiracy to commit non-cognizable offences under sections 466 and 467, Indian Penal Code. We do not think it necessary to say anything on the point because in any case the case has to go back to the Special Judge for re-framing the charges and there is time enough for the Government to consider whether it should accord sanction to the prosecution of the various accused for the non-cognizable offences alleged to have

1. I.L.R. (1954) Bom. 554.

been committed by them in pursuance of conspiracy, assuming of course, that sanction is necessary.

In the result we allow the appeal and set aside the order of the High Court and direct the Special Judge to frame fresh charges and proceed with the trial. The matter has been pending for a long time and we direct that the trial will proceed with all expedition.

K.L.B. ——— *Appeal allowed.*

SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. L. KAPUR, P. B. GAJENDRAGADKAR, K. SUBBA RAO AND K. N. WANCHOO, JJ.

The State of Punjab .. *Appellant**

v.

Sodhi Sukhdev Singh .. *Respondent.*

The State of Maharashtra .. *Intervener.*

Evidence Act (I of 1872), sections 123 and 162—Scope—Document for which privilege is claimed by State under section 123—Limits to jurisdiction of Court to go into the matter—Civil Procedure Code (V of 1908), Order 11, rule 19 (2)—Scope.

Reading sections 123 and 162 of the Evidence Act together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide ; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under section 123 or not. In this enquiry the Court has to determine the character or class of the document If it comes to the conclusion that the document does not relate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not. In exercising his discretion under section 123 in many cases the head of the department may have to weigh the pros and cons of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. While construing sections 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion. In view of the provisions of section 162 the position in India in regard to the Court's power and jurisdiction is different from the position under the English Law as it obtained in England in 1872. The effect of the first clause of section 162 of the Evidence Act clearly brings out the departure made by the Indian Law in one material particular, and that is the authority given to the Court to hold a preliminary enquiry into the character of the document.

Where privilege is claimed at the stage of inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Evidence Act under which privilege is claimed as well as the provisions of section 162 which deal with the manner in which the said privilege has to be considered are equally applicable ; and if a Court is precluded from inspecting the privileged document under the second clause of section 162 the said prohibition would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection. The provisions of Order 11, rule 19 (2) of the Code of Civil Procedure must be read subject to section 162 of the Evidence Act.

The Court can take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised even under section 123 of the Evidence Act. If the document cannot be inspected its contents cannot be indirectly proved; but that is not to say that other collateral evidence cannot be prod uced which may assist the Court in determining the validity of the objection.

Per *Kapur, J.*—The Court cannot take other evidence in regard to the nature of the document, for which privilege is claimed.

Per *Subba Rao, J.*—Under section 162 of the Evidence Act the Court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State ; but in its discretion the Court will exercise its power only in exceptional circumstances when public interest demands, that is, when the public interest served by the disclosure clearly outweighs that served by the non-disclosure. One of such instances is where the public interest

* C.A. No. 337 of 1960. 15th November, 1960.

served by the administration of justice in a particular case overrides all other aspects of public interest. The said claim shall be made by an affidavit filed by a Minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. Ordinarily the Court shall accept the affidavit of the Minister, but in exceptional circumstances when it has reason to believe that there is more than what meets the eye, it can examine the Minister and take other evidence to decide the question of privilege. Under no circumstances can a Court inspect such a document or permit giving of secondary evidence of its contents. Subject to the overriding power of the Court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the Courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State ;

(*a*) " records relating to affairs of State " mean documents of State whose production would endanger the public interest ; (*b*) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State ; (*c*) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State ; but in special circumstances they may partake of that character ; (*d*) in cases of documents mentioned in (*c*) supra, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

Under Article 163 of the Constitution the question whether any and if so what advice was tendered by Ministers to the Governor shall not be inquired into by any Court.

Appeal by Special Leave from the Judgment and Order dated the 19th January, 1960, of the Punjab High Court in Civil Revision No. 596 of 1959.

N. S. Bindra, Senior Advocate (*D. Gupta*, Advocate, with him), for Appellant.

Gopal Singh, Advocate, for Respondent.

H. M. Seervai, Advocate-General for the State of Maharashtra (*R. H. Dhebar*, Advocate, with him), for Intervener.

The Court delivered the following Judgments:—

Gajendragadkar, J. (on behalf of *B.P. Sinha, C.J.*, *Wanchoo, J.*, and himself). This appeal raises for our decision a question of law of general importance under sections 123 and 162 of the Indian Evidence Act, 1872 (hereafter called the Act). Originally the same point had been raised in another civil appeal before this Court, Civil Appeal No. 241 of 1955. The said appeal was the result of a dispute between Dowager Lady Dinbai Dinshaw Petit on the one hand and the Union of India and the State of Bombay on the other. Having regard to the importance of the point raised by the said appeal a Division Bench of this Court before whom it first came for hearing directed that it should be placed for disposal before a Constitution Bench, and accordingly it was placed before us. The appellant and the respondent in the present appeal then applied for permission to intervene because the same point arose for decision in this appeal as well ; that is how this appeal was also placed before us to be heard after the Bombay appeal. After the Bombay appeal was heard for some days parties to the said appeal amicably settled their dispute and a decree by consent was passed. In the result the point of general importance raised by the said appeal fell to be considered in the present appeal ; and so the appellant and the respondent in the said appeal asked for permission to intervene in the present a ppeal, and we directed that the arguments urged by Mr. Viswanatha Sastri and Mr. Seervai, for the appellant and the State of Bombay respectively, should be treated as arguments urged by interveners in the present appeal. Mr. Bindra, who appears for the appellant State of Punjab in the present appeal, and Mr. Gopal Singh who represents the respondent Sodhi Sukhdev Singh, have substantially adopted the arguments urged by Mr. Seervai and Mr. Sastri respectively and have also addressed us on the special facts in their appeal ; that is how the point of law in regard to the scope and effect of sections 123 and 162 of the Act has to be decided in the present appeal.

This appeal has been brought to this Court by Special Leave granted by this Court, and it arises from a suit filed by the respondent against the appellant on May 5, 1958. It appears that the respondent was a District and Sessions Judge in the erstwhile State of Pepsu. He was removed from service on April 7, 1953, by an order passed by the President of India who was then in charge of the administration of the said State. The respondent then made a representation on May 18, 1955. This representation was considered by the Council of Ministers of the said State on Sep-

tember 28, 1955, because in the meantime the President's Rule had come to an end and the administration of Pepsu was entrusted to the Council of Ministers. The Counil expressed its views in the form of a Resolution on the representation of the respondent; but before taking any action it invited the advice of the Public Service Commission. On receiving the said advice the Council again considered the said representation on March 8, 1956, and views on the merits of the representation were expressed by the Members of the Council. These were recorded in the minutes of the proceedings. Finally, on August 11, 1956, the representation was considered over again by the Council, and it reached a final conclusion in respect of it. In accordance with the said conclusion an order was passed which was communicated to the respondent. The order read thus:

"Reference his representation dated the 18th May, 1955, against the order of his removal from service; the State Government have ordered that he may be re-employed on some suitable post."

After this order was communicated to him the respondent filed the present suit against the appellant and claimed a declaration, *inter alia*, that his removal from service on April 7, 1953, was illegal, void and inoperative and prayed for the recovery of Rs. 62,700-6-0 as arrears of his salary. The appellant disputed the respondent's claim on several grounds. Issues were accordingly framed by the trial Judge on January 27, 1959. Meanwhile the respondent had filed an application under Order 14, rule 4 as well as Order 11, rule14 of the Civil Procedure Code for the production of documents mentioned in the list annexed to the application. The trial Court issued notice against the appellant for the production of the said documents. In reply to the notice Mr. E.N. Mangat Rai, Chief Secretary of the appellant, made an affidavit claiming privilege under section 123 of the Act in respect of certain documents whose production had been ordered, and gave reasons in support of the claim. On the same day Mr. Mangat Rai made another affidavit in which he gave reasons for claiming similar privilege in respect of certain other documents. The statements made in these affidavits were challenged by the respondent who submitted a counter-affidavit. After the affidavits had thus been filed by the parties the trial Court heard their arguments on the question of privilege, and on August 27, 1959, it upheld the claim of privilege made by the appellant for the production of some documents, and accepted the reasons given by Mr. Mangat Rai in support of the said claim of privilege.

The respondent then moved the High Court of Punjab under section 115 of the Code of Civil Procedure and Article 227 of the Constitution for the quashing of the said order. The petition for revision (C.R. 596 of 1959) first came up for decision before D.K. Mahajan, J., at Chandigarh. The learned Judge took the view that the question raised by the petition was of considerable importance, and so he ordered that the papers should be placed before the learned Chief Justice to enable him to direct that the matter be decided by a larger Bench. Thereupon the petition was placed for decision before Dulat and Dua, JJ., who, after hearing the parties, reversed the order under revision in respect of four documents, and directed that the said documents be produced by the appellant. The appellant then applied to the High Court for a certificate under Article 133 but its application was dismissed. It then came to this Court and applied for and obtained Special Leave to challenge the validity of the order passed by the Punjab High Court; and in the appeal the only question which has been urged before us is that having regard to the true scope and effect of the provisions of sections 123 and 162 of the Act the High Court was in error in refusing to uphold the claim of privilege raised by the appellant in respect of the documents in question.

The question thus posed will naturally have to be answered on a fair and reasonable construction of the two statutory provisions of the Act. It has, however, been very strenuously urged before us by Mr. Seervai that before proceeding to construe the said provisions it is necessary that the Court should bear in mind the historical background of the said provisions. His argument is that sections 123 and 162 as they were enacted in the Act in 1872 were intended to introduce in India the English Law in regard to what is commonly described as the Crown

privilege in the same form in which it obtained in England at the material time ; and so he has asked us to determine in the first instance what the true state of English Law was in or about 1872 A.D.

In order to decide this question three representative English decisions must be considered. In *Home* v. *Lord F.C. Bentinck*[1], the Court was dealing with a claim made by *H* who had sued the president of the enquiry for a libel alleged to be contained in the report made by him. It appears that *H* was a commissioned officer in the Army and the Commander-in-Chief of the said Army had directed an assemblage of commissioned military officers to hold an enquiry into the conduct of *H*. According to *H* the said report contained libellous matter, and so he had sued the president of the enquiry. At the trial *H* desired that the report submitted by the Court of enquiry should be produced and this request was resisted by the defendant on the ground that the document in question was a privileged communication. This plea was upheld. Dallas, C.J., referred to the precedents relevant to the decision of the point and observed that the basis of the said precedents was that the disclosure would cause danger to the public good. He then considered the nature of the enquiry which had been directed against *H*, and observed that in the course of the enquiry a number of persons may be called before the Court and may give information as witnesses which they would not choose to have disclosed ; but, if the minutes of the Court of enquiry are to be produced on an action brought by the party, they reveal the name of every witness and the evidence given by each. Not only this but they also reveal what has been said and done by each member of the existing Court of enquiry ; and, according to the learned Judge, the reception of the said minutes would tend directly to disclose that which is not permitted to be disclosed ; and so, independently of the character of the Court the production of the report was privileged on the broad rule of public policy and convenience that matters like those covered by the report are secret in their nature and involve delicate enquiry and the names of persons who ought to stand protected.

The next decision to which our attention has been invited is *Smith* v. *The East India Company*[2]. In that case the dispute with which the Court was concerned had arisen with respect to a commercial transaction in which the East India Company had been engaged with a third party ; and privilege was claimed in regard to the correspondence which had been carried on by the defendant with the Board of Control. It was held that the said correspondence was, on the ground of public policy, a privileged communication, and so the Company were not bound to produce or set forth the contents of it in answer to a bill of discovery filed against them by the third party in relation to the transaction to which it referred. Lord Lyndhurst upheld the claim of privilege not because the correspondence purported to be confidential nor because it was official, but because of the effect of the provisions of c. 85 of Act 3 and 4 W. 4 on which the claim of privilege was founded. It was noticed that the Company had been prohibited from carrying on any commercial transactions except for the purpose of winding up their affairs or for the purposes of the Government of India ; and it was held that the result of the relevant provisions, and particularly of section 29 was that the Directors of the East India Company were required to make communication of all their acts, transactions and correspondence of every description to the Board of Control. That is why a claim for privilege in respect of the said correspondence was upheld. This decision shows that a claim for privilege could have been made even for correspondence which had reference to a commercial transaction in circumstances similar to those in that case.

The last decision on which considerable reliance has been placed by Mr. Seervai is the case of *Beatson* v. *Skene*[3]. It may incidentally be pointed out that Chief Baron Pollock's observations in this judgment are frequently cited in judicial decisions where the question of privilege falls to be considered. In that case the plaintiff had been a general who commanded a corps of irregular troops during the war in

1. 129 E.R. 907.
2. 41 E.R. (Chancery) 550.
3. (1860) 5 H. & N. 838.

Crimea. Complaint having been made about the insubordination of troops the corps was placed under the superior command of *V*. Thereupon the plaintiff resigned his command. *V* directed *S* to inspect and report upon the state of the corps, and referred *S* for information to the defendant who was a Civil Commissioner. The defendant, in a conversation with *S*, made a defamatory statement respecting the conduct of the plaintiff. The plaintiff brought an action against the defendant for slander. The defence set up against the plaintiff's claim was that what had passed between the defendant and *S* was a privileged communication. The jury had found a verdict for the defendant. A new trial was claimed by the plaintiff, *inter alia*, on the ground that the learned Judge had declined to compel the production of certain documents. It appeared that the Secretary for War had been subpœnæd to produce certain letters written by the plaintiff to him and also the minutes of the Court of enquiry as to the conduct of *S* in writing the letter to *V*. The plea for a new trial was rejected on the ground that the Court was of the opinion that the non-production of the said documents furnished no ground for a new trial. There was a difference of opinion among the members of the Court on the question as to whether Bramwell, J., was justified in upholding the claim of privilege. Pollock, C.B., Bramwell, B., and Wilde, B., held, that the claim for privilege was properly upheld, whereas Martin, B., took a contrary view.

Dealing with the claim made that the production of the documents would be injurious to the public service Pollock, C.B., observed that the general public interest must be considered paramount to the individual interest of a suitor in a Court of Justice, and he posed the question : How is this to be determined ? Then Pollock, C.B., proceeded to observe that the question must be determined either by a presiding Judge or by the responsible servant of the Crown in whose custody the paper is ; and he remarked that the Judge would be unable to determine it without ascertaining what the document is and why the publication of it would be injurious to public service—an enquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. He further held that " the administration of justice is only a part of the general conduct of the affairs of any State or nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community ". Martin, B., however, was of the opinion that whenever the Judge is satisfied that the document may be made public without prejudice to the public service the Judge ought to compel its production notwithstanding the reluctance of the head of the department to produce it. It would thus be seen that according to the majority view the question as to whether any injury to public interest would be caused by the production of the document could not be determined by the Court, because, such an enquiry would tend to defeat the very purpose for which privilege is claimed, whereas, according to the minority view it was for the Court to hold an enquiry and determine whether any injury would follow the production of the document.

Mr. Seervai contends that these decisions correctly represent the legal position in regard to the Crown privilege in England in the second half of the Ninteenth Century, and, according to him, when the Indian Evidence Act was drafted by Sir James Fitzjames Stephen he intended to make provisions in the Act which would correspond to the said position in the English Law. In other words , the argument is that sections 123 and 162 are intended to lay down that, when a privilege is claimed by the State in the matter of production of State documents, the total question with regard to the said claim falls within the discretion of the head of the department concerned, and he has to decide in his discretion whether the document belongs to the privileged class and whether its production would cause injury to public interest. It is in the light of this background that Mr. Seervai wants us to construe the relevant sections of the Act.

In support of this argument Mr. Seervai has also referred us to the draft prepared by Sir James Fitzjames Stephen at the instance of Lord Coleridge for adoption

by the English Parliament, and has relied on Article 112 in the said draft. Article 112 provides, *inter alia*, that no one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, unless the officer at the head of the department concerned permits him to do so. It also refers to some other matters with which we are not concerned. This part of Article 112 as framed by Sir James Fitzjames Stephen seems to include the provisions of sections 123 and 124 of the Act. It is significant that there is nothing in this Article which corresponds to section 162 of the Act. Mr. Seervai concedes that the draft prepared by Sir James Fitzjames Stephen was not adopted by Parliament, and even now there is no statutory law of evidence in England ; even so, he contends that the intention which Sir James Fitzjames Stephen had in drafting the relevant sections of the Indian Evidence Act must have been similar to his intention in drafting Article 112, and that is another fact which we may bear in mind in construing the relevant sections of the Act. We ought, however, to add that though Mr. Seervai elaborately argued this part of his case he fairly conceded that recourse to extrinsic aid in interpreting a statutory provision would be justified only within well recognised limits ; and that primarily the effect of the statutory provisions must be judged on a fair and reasonable construction of the words used by the statute itself.

Let us now turn section 123. It reads thus :

> " No one shall be permitted to give any evidence derived fiom unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit."

This section refers to evidence derived from unpublished official records which have a relation to any affairs of State, and it provides that such evidence shall not be permitted to be given unless the head of the department concerned gives permission in that behalf. In other words, as a result of this section a document which is material and relevant is allowed to be withheld from the Court, and that undoubtedly constitutes a very serious departure from the ordinary rules of evidence. It is well-known that in the administration of justice it is a principle of general application that both parties to the dispute must produce all the relevant and material evidence in their possession or their power which is necessary to prove their respective contentions ; that is why the Act has prescribed elaborate rules to determine relevance and has evolved the doctrine of onus of proof. If the onus of proof of any issue is on a party and it fails to produce such evidence, section 114 of the Act justifies the inference that the said evidence if produced would be against the interest of the person who withholds it. As a result of section 123 no such inference can be drawn against the State if its privilege is upheld. That shows the nature and the extent of the departure from the ordinary rule which is authorised by section 123.

The principle on which this departure can be said and is justified is the principle of the overriding and paramount character of public interests. A valid claim for privilege made under section 123 proceeds on the basis of the theory that the production of the document in question would cause injury to public interest, and that, where a conflict arises between public interest and private interest, the latter must yield to the former. No doubt the litigant whose claim may not succeed as a result of the non-production of the relevant and material document may feel aggrieved by the result, and the Court, in reaching the said decision, may feel dissatisfied ; but that will not affect the validity of the basic principle that public good and interest must override considerations of private good and private interest. Care has, however, to be taken to see that interests other than that of the public do not masquerade in the garb of public interest and take undue advantage of the provisions of section 123. Subject to this reservation the maxim *silus populi est supreme les* which means that regard for public welfare is the highest law is the basis of the provisions contained in section 123. Though section 123 does not expressly refer to injury to public interest that principle is obviously implicit in it and indeed is its sole foundation.

Whilst we are discussing the basic principle underlying the provisions of section 123, it may be pertinent to enquire whether fair and fearless administration of justice itself is not a matter of high public importance. Fair administration of justice between a citizen and a citizen or between a citizen and the State is itself a matter of great public importance; much more so would the administration of justice as a whole be a matter of very high public importance: even so, on principle, if there is a real, not imaginary or fictitious, conflict between public interest and the interest of an individual in a pending case, it may reluctantly have to be conceded that the interest of the individual cannot prevail over the public interest. If social security and progress which are necessarily included in the concept of public good are the ideal then injury to the said ideal must on principle be avoided even at the cost of the interest of an individual involved in a particular case. That is why Courts are and ought to be vigilant in dealing with a claim of privilege made under section 123.

If under section 123 a dispute arises as to whether the evidence in question is derived from unpublished official records that can be easily resolved; but what presents considerable difficulty is a dispute as to whether the evidence in question relates to any affairs of State. What are the affairs of State under section 123? In the latter half of the Nineteenth Century affairs of State may have had a comparatively narrow content. Having regard to the notion about governmental functions and duties which then obtained, affairs of State would have meant matters of political or administrative character relating, for instance, to national defence, public peace and security and good neighbourly relations. Thus, if the contents of the documents were such that their disclosure would affect either the national defence or public security or good neighbourly relations they could claim the character of a document relating to affairs of State. There may be another class of documents which could claim the said privilege not by reason of their contents as such but by reason of the fact that, if the said documents were disclosed, they would materially affect the freedom and candour of expression of opinion in the determination and execution of public policies. In this class may legitimately be included notes and minutes made by the respective officers on the relevant files, opinions expressed, or reports made, and gist of official decisions reached in the course of the determination of the said questions of policy. In the efficient administration of public affairs government may reasonably treat such a class of documents as confidential and urge that its disclosure should be prevented on the ground of possible injury to public interest. In other words, if the proper functioning of the public service would be impaired by the disclosure of any document or class of documents such document or such class of documents may also claim the status of documents relating to public affairs.

It may be that when the Act was passed the concept of governmental functions and their extent was limited, and so was the concept of the words "affairs of State" correspondingly limited; but, as is often said, words are not static vehicles of ideas or concepts. As the content of the ideas or concepts conveyed by respective words expands, so does the content of the words keep pace with the said expanding content of the ideas or concepts, and that naturally tends to widen the field of public interest which the section wants to protect. The inevitable consequence of the change in the concept of the functions of the State is that the State in pursuit of its welfare activities undertakes to an increasing extent activities which were formerly treated as purely commercial, and documents in relation to such commercial activities undertaken by the State in the pursuit of public policies of social welfare are also apt to claim the privilege of documents relating to the affairs of State. It is in respect of such documents that we reach the marginal line in the application of section 123; and it is precisely in determining the claim for privilege for such border-line cases that difficulty arises.

It is, however, necessary to remember that where the Legislature has advisedly refrained from defining the expression "affairs of State" it would be inexpedient for judicial decisions to attempt to put the said expression into a straight jacket of a

definition judicially evolved. The question as to whether any particular document or a class of documents answers the description must be determined in each case on the relevant facts and circumstances adduced before the Court. "Affairs of State", according to Mr. Seervai, are synonymous with public business and he contends that section 123 provides for a general prohibition against the production of any document relating to public business unless permission for its production is given by the head of the department concerned. Mr. Seervai has argued that documents in regard to affairs of State constitute a genus under which there are two species of documents, one the disclosure of which will cause no injury to public interest, and the other the disclosure of which may cause injury to public interest. In the light of the consequence which may flow from their disclosure the two species of documents can be described as innocuous and noxious respectively. According to Mr. Seervai the effect of section 123 is that there is a general prohibition against the production of all documents relating to public business subject to the exception that the head of the department can give permission for the production of such documents as are innocuous and not noxious. He contends that it is not possible to imagine that the section contemplates that the head of the department would give permission to produce a noxious document. It is on this interpretation of section 123 that Mr. Seervai seeks to build up similarity between section 123 and the English Law as it was understood in 1872. In other words, according to Mr. Seervai the jurisdiction of the Court in dealing with a claim of privilege under section 123 is very limited and in most of the cases, if not all, the Court would have to accept the claim without effective scrutiny.

On the other hand it has been urged by Mr. Sastri that the expression "documents relating to any affairs of State" should receive a narrow construction; and it should be confined only to the class of noxious documents. Even in regard to this class the argument is that the Court should decide the character of the document and should not hesitate to enquire, incidentally if necessary, whether its disclosure would lead to injury to public interest. This contention seeks to make the jurisdiction of the Court wider and the field of discretion entrusted to the department correspondingly narrower.

It would thus be seen that on the point in controversy between the parties three views are possible. The first view is that it is the head of the department who decides to which class the document belongs; if he comes to the conclusion that the document is innocuous he will give permission to its production; if, however, he comes to the conclusion that the document is noxious he will withhold such permission; in any case the Court does not materially come into the picture. The other view is that it is for the Court to determine the character of the document, and if necessary enquire into the possible consequences of its disclosure; on this view the jurisdiction of the Court is very much wider. A third view which does not accept either of the two extreme positions would be that the Court can determine the character of the document, and if it comes to the conclusion that the document belongs to the noxious class it may leave it to the head of the department to decide whether its production should be permitted or not; for it is not the policy of section 123 that in the case of every noxious document the head of the department must always withhold permission. In deciding the question as to which of these three views correctly represents the true legal position under the Act it would be necessary to examine section 162. Let us therefore, turn to that section.

Section 162 reads thus:

"A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility."

The first clause of section 162 requires that a witness summoned to produce a document must bring it to the Court and then raise an objection against either its production or its admissibility. It also authorises the Court, and indeed makes it its

obligation, to decide the validity of either or both of the said objections. It is significant that the objections to the production or admissibility of evidence specified in section 162 relate to all claims of privilege provided by the relevant sections of Chapter IX of Part III of the Act. Section 123 is only one of such privileges so that the jurisdiction given to the Court to decide the validity of the objections covers not only the objections raised under section 123 but all other objections as well. Take for instance the privilege claimed under section 124 of the Act which provides that no public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by the disclosure. It is clear, and indeed it is not disputed, that in dealing with an objection against the production of a document raised under section 124 the Court would have first to determine whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be disclosed or not. This illustration brings out the character and the scope of the jurisdiction conferred on the Court in dealing with an objection raised under section 162.

The second clause of section 162 in terms refers to the objection as to the admissibility of the document. It seems to us that this clause should be construed to refer to the objections both as to the production and the admissibility of documents; otherwise, in the absence of any limitation on its power the Court would be justified in exercising its authority under, and discharging its obligation imposed by clause (1) of section 162 by inspecting the document while holding an enquiry into the validity of the objection raised against its production under section 123, and that would be inconsistent with the mateiral provision in clause (2) of section 162. That is why we hold that the second clause covers both kinds of objections. In other words, admissibility in the context refers both to production and admissibility. It may be added that "matters of State" referred to in the second clause are identicl with "affairs of State" mentioned in section 123.

Reading this clause on this assumption what is its effect? It empowers the Court to inspect the document while dealing with the objection; but this power cannot be exercised where the objection relates to a document having reference to matters of State and it is raised under section 123. In such a case the Court is empowered to take other evidence to enable it to determine the validity of the objection. Mr. Seervai contends that the first part of clause (2) which deals with the inspection of the document is confined to the objection relating to the production of the document, and on that basis he contends that since inspection is not permissible in regard to the document falling under section 123 the Court can do nothing else but record its approval to, and uphold the validity of, the objection raised by the head of the department. In regard to the objection as to the admissibility of the said document, however, he concedes that the Court can take other evidence, if necessary, and then determine its validity. According to him, such evidence would be necessary and permissible when the objection to admissibility is based for instance on want of stamp or absence of registration. In our opinion, this construction though ingenious is not supportable on a plain and grammatical construction of the clause read as a whole; it breaks up the clause artificially which is plainly not justified by rules of grammar. We are satisfied that the Court can take other evidence in lieu of inspection of the document in dealing with a privilege claimed or an objection raised even under section 123. If the privileged document cannot be inspected the Court may well take other collateral evidence to determine its character or class. In other words, the jurisdiction conferred on the Court to deal with the validity of an objection as to the production of a document conferred by the first clause is not illusory or nominal; it has to be exercised in cases of objections raised under section 123 also by calling for evidence permissible in that behalf. It is perfectly true that in holding an enquiry into the validity of the objection under section 123 the Court cannot permit any evidence about the

contents of the document. If the document cannot be inspected its contents cannot indirectly be proved; but that is not to say that other collateral evidence cannot be produced which may assist the Court in determining the validity of the objection.

This position would be clear if at this stage we consider the question as to how an objection against the production of document should be raised under section 123. It is well-settled and not disputed that the privilege should not be claimed under section 123 because it is apprehended that the document if produced would defeat the defence raised by the State. Anxiety to suppress a document may be natural in an individual litigant and so it is checked and kept under control by the provisions of section 114 of the Act. Where, however, section 123 confers wide powers on the head of the department to claim privilege on the ground that the disclosure may cause injury to public interest scrupulous care must be taken to avoid making a claim for such a privilege on the ground that the disclosure of the document may defeat the defence raised by the State. It must be clearly realised that the effect of the document on the ultimate course of litigation or its impact on the head of the department or the Minister in charge of the department, or even the Government in power, has no relevance in making a claim for privilege under section 123. The apprehension that the disclosure may adversely affect the head of the department or the department itself or the Minister or even the Government, or that it may provoke public criticism or censure in the Legislature has also no relevance in the matter and should not weigh in the mind of the head of the department who makes the claim. The sole and the only test which should determine the decision of the head of the department is injury to public interest and nothing else. Since it is not unlikely that extraneous and collateral purposes may opeate in the mind of the person claiming the privilege it is necessary to lay down certain rules in respect of the manner in which the privilege should be claimed. We think that in such cases the privilege should be claimed generally by the Minister in charge who is the political head of the department concerned; if not, the Secretary of the department who is the departmental head should make the claim; and the claim should always be made in the form of an affidavit. When the affidavit is made by the Secretary the Court may, in a proper case, require an affidavit of the Minister himself. The affidavit should show that each document in question has been carefully read and considered, and the person making the affidavit is satisfied that its disclosure would lead to public injury. If there are a series of documents included in a file it should appear from the affidavit that each one of the documents, whose disclosure is objected to, has been duly considered by the authority concerned. The affidavit should also indicate briefly within permissble limits the reason why it is apprehended that their disclosure would lead to injury to public interest. This last requirement would be very important when privilege is claimed in regard to documents which *prima facie* suggest that they are documents of a commercial character having relation only to commercial activities of the State. If the document clearly falls within the category of privileged documents no serious dispute generally arises; it is only when Courts are dealing with mariginal or border-line documents that difficulties are experienced in deciding whether the privilege should be upheld or not, and it is particularly in respect of such documents that it is expedient and desirable that the affidavit should give some indication about the reasons why it is apprehended that public interest may be injured by their disclosure.

It is conceded by Mr. Seervai that if the affidavit produced in support of the claim for privilege is found to be unsatisfactory a further affidavit may be called, and in a proper case the person making the affidavit whether he is a Minister or the Secretary should be summoned to face cross-examination on the relevant points. Mr. Seervai, however, contends that the object of such cross-examination must be limited to test the credibility of the witness and nothing more. We do not see why any such limitation should be imposed on cross-examination in such a case. It would be open to the opponent to put such relevant and permissible questions

as he may think of to help the Court in determining whether the document belongs to the privileged class or not. It is true that the scope of the enquiry in such a case is bound to be narrow and restricted ; but the existence of the power in the Court to hold such an enquiry will itself act as a salutory check on the capricious exercise of the power conferred under section 123 ; and as some of the decisions show the existence of this power is not merely a matter of theoretical abstraction (*Vide* for instance, *Ijjat Ali Talukdar* v. *Emperor*[1].

Thus our conclusion is that reading sections 123 and 162 together the Court cannot hold an enquiry into the possible injury to public interest which may result from the disclosure of the document in question. That is a matter for the authority concerned to decide ; but the Court is competent, and indeed is bound, to hold a preliminary enquiry and determine the validity of the objections to its production, and that necessarily involves an enquiry into the question as to whether the evidence relates to an affair of State under section 123 or not.

In this enquiry the Court has to determine the character or class of the document. If it comes to the conclusion that the document does not rélate to affairs of State then it should reject the claim for privilege and direct its production. If it comes to the conclusion that the document relates to the affairs of State it should leave it to the head of the department to decide whether he should permit its production or not. We are not impressed by Mr. Seervai's argument that the Act could not have intended that the head of the department would permit the production of a document which belongs to the noxious class. In our opinion, it is quite conceivable that even in regard to a document falling within the class of documents relating to affairs of State the head of the department may legitimately take the view that its disclosure would not cause injury to public interest. Take for instance the case of a document which came into existence quite some time before its production is called for in litigation ; it is not unlikely that the head of the department may feel that though the character of the document may theoretically justify his refusing to permit its production, at the time when this production is claimed no public injury is likely to be caused. It is also possible that the head of the department may feel that the injury to public interest which the disclosure of the document may cause is minor or insignificant, indirect or remote ; and having regard to the wider extent of the direct injury to the cause of justice which may result from its non-production he may decide to permit its production. In exercising his discretion under section 123 in many cases the head of the department may have to weigh the *pros* and *cons* of the problem and objectively determine the nature and extent of the injury to public interest as against the injury to the administration of justice. That is why we think it is not unreasonable to hold that section 123 gives discretion to the head of the department to permit the production of a document even though its production may theoretically lead to some kind of injury to public interest. While construing sections 123 and 162, it would be irrelevant to consider why the enquiry as to injury to public interest should not be within the jurisdiction of the Court, for that clearly is a matter of policy on which the Court does not and should not generally express any opinion.

In this connection it is necessary to add that the nature and scope of the enquiry which, in our opinion, it is competent to the Court to hold under section 162 would remain substantially the same whether we accept the wider or the narrower interpretation of the expression " affairs of State ". In the former case the Court will decide whether the documet falls in the class of innocuous or noxious documents; if it finds that the document belongs to the innocuous class it will direct its production; if it finds that the document belongs to the noxious class it will leave it to the discretion of the head of the department whether to permit its production or not. Even on the narrow construction of the expression " affairs of State " the Court will determine its character in the first instance; if it holds that it does not fall within the noxious class which alone is included in the relevant expression on this view an order for

1. I.L.R. (1944) 1 Cal. 410.

its production will follow ; if the finding is that it belongs to the noxious class the question about its production will be left to the discretion of the head of the department. We have already stated how three views are possible on this point. In our opinion, Mr. Seervai's contention which adopts one extreme position ignores the effect of section 162, whereas the contrary position which is also extreme in character ignores the provisions of section 123. The view which we are disposed to take about the authority and jurisdiction of the Court in such matters is based on a harmonious construction of section 123 and section 162 read together ; it recognises the power conferred on the Court by clause (1) of section 162, and also gives due effect to the discretion vested in the head of the department by section 123.

It would thus be clear that in view of the provisions of section 162 the position in India in regard to the Court's power and jurisdiction is different from the position under the English Law as it obtained in England in 1872. It may be true to say that in prohibiting the inspection of documents relating to matters of State the second clause of section 162 is intended to repeal the minority view of Baron Martin in the case of *Beatson*[1]. Nevertheless the effect of the first clause of section 162 clearly brings out the departure made by the Indian Law in one material particular, and that is the authority given to the Court to hold a preliminary enquiry into the character of the document. That is why we think that the arguments so elaborately and ingeniously built up by Mr. Seervai on the basis of the background of the Indian Evidence Act breaks down in the light of the provisions of section 162. We may add that in substance and broadly stated the consensus of judicial opinion in this country is in favour of this conclusion. (Vide : *e.g.*, *Kaliappa Udayan* v. *Emperor*[2] ; *R.M.D. Chamarbaugwala* v. *Y.R. Parpia*[3] ; *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux and others*[4]; *The Public Prosecutor, Andhra* v. *Venkata Narasayya*[5] ; and *Ijjat Ali Talukdar* v. *Emperor*[6]. Therefore we think it is unnecessary to refer to these decisions in detail or to examine the reasons given by them in support of the conclusion reached by them.

There are, however, two decisions which have struck a note of dissent, and so it is necessary to examine them. In *W. S. Irwin* v. *D.J. Reid*[7], it appears that the Court was incidentally dealing with the scope and effect of section 123 of the Act. In that case the plaintiff was one of the members of the committee, known as the Champaran Agrarian Enquiry Committee, and as such member he had effected a settlement between the indigo planters and the tenants about the partial refund of tawan or remission of sarabeshi. The defendant Irwin wrote three letters to the members after the settlement which taken together would import that his consent to the settlement was obtained by misrepresentation and all facts were not disclosed to him. Thereupon Reid filed a suit claiming Rs. 50,000 as damages against Irwin for making the said defamatory statements which according to him greately injured his credit and reputation and had brought him into public odium and contempt. It appears that at the trial an attempt was made to compel the production of the minutes of the committee. The said attempt failed because the Government of Bihar and Orissa claimed privilege under section 123. In appeal it was urged that the privilege should not have been upheld, but the appellant's plea was not accepted by the Court. " The public officer concerned ", observed Mookerjee, A.C.J.,

> " and not the Judge is to decide whether the evidence referred to shall be given or withheld. If any other view were taken the mischief intended to be avoided would take place as the Judge could not determine the question without ascertaiaing the contents of the document, and such enquiry, if it did take place, must, for obvious reasons take place in public."

In support of this decision the learned Judge referred to some English decisions ; amongst them was the case of *Beatson* v. *Skene*.[1] It would be noticed that in making these incidental observations the Court has not considered the true effect

1. (1860) 5 H. & N. 838.
2. (1937) 1 M.L.J. 613 : A.I.R. 1937 Mad. 492.
3. A.I.R. 1950 Bom. 230.
4. A.I.R. 1950 East Punjab 228.
5. 1957 M.L.J. (Crl.) 19 : (1957) 1 An.W.R. 106 : A.I.R. 1957 Andh. 486.
6. I.L.R. (1944) 1 Cal. 410.
7. (1921) I.L.R. 48 Cal. 304.

of the provisions of section 162. Indeed no reference was made to the said section and the matter does not appear to have been seriously argued and naturally, because the point was not directly raised for decision. In this connection we ought to point out that in a subsequent decision of the said High Court in *Ijjat Ali Talukdar's case*[1], a contrary view has been taken and it is the subsequent view which has prevailed in the Calcutta High Court thereafter.

In *Khawaja Nazir Ahmed* v. *The Crown*[2], the High Court of Judicature at Lahore has held that when a privilege is claimed under section 123 the Court simply gives effect to the decisions of the head of the department by adding its own command to it but the Court has no power to examine the document in order to verify the correctness of the allegations or the grounds on which the privilege is claimed. Abdur Rahman, J., who delivered the judgment of the Bench in that case, has considered the relevant Indian and English decisions, and has based his conclusion substantially on the judgment of the House of Lords in *Duncan* v. *Cammell Laird & Co. Ltd.*[3], to which we will presently refer. The learned Judge appears to have construed section 162 in the manner suggested by Mr. Seervai. In fact Mr. Seervai's argument was that the construction placed by Abdur Rahman, J., on section 162 had not been considered by the other Indian decisions when they brushed aside his conclusion. " I feel convinced " said Abdur Rahman, J.:

> " that the objection as to the production of the document, apart from its admissibility (for want of registration or contravening the rule as to when secondary evidence of a document can be admitted—if the document is merely, a copy and not original) can only be decided by its inspection by the Court, followed as it must necessarily have been, by an order of production, although not in the sense of its contents having been disclosed to the party summoning the document at any rate at that stage.".

We have already indicated our reasons for not accepting this artificial construction of the second clause in section 162. This decision also has been dissented from by a Full Bench of the Lahore High Court in *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux and others*[4], and the view taken by the Full Bench in that case prevails in the Punjab High Court ever since.

In the course of arguments before us a large number of English decisions have been cited by the learned counsel appearing for both the parties. Having regard to the fact that our decision ultimately rests, as it must, on the construction of the relevant provisions of the Act, we do not think it necessary to refer to all the cases to which our attention was drawn ; we propose to confine ourselves to three decisions which have made a substantial contribution to the discussion of the problem and which represent three distinct and different trends of judicial opinion on the point with which we are dealing.

The first case to which we would refer is the decision of the Privy Council in *Robinson* v. *State of South Australia*[5]. In that case the appellant had brought an action in the Supreme Court of South Australia against the respondent-State claiming damages for alleged negligence in the care of wheat placed in the control of the State under the Wheat Harvests Acts, 1915-17. Upon an order for discovery the respondent-State, by an affidavit made by a civil servant, claimed privilege in respect of 1892 documents tied in three bundles, and stated to be State documents comprising communications between officers administering the department concerned. There was exhibited to the affidavit a minute by the responsible Minister stating, *inter alia*, that the disclosure of documents would be contrary to the interests of the State and of the public. The claim for privilege had been upheld by the Australian Courts but it was rejected by the Privy Council which held that the minute was inadequate to support the claim ; it was too vague in the circumstances of the case, and was not a statement on oath showing that the Minister had himself considered each of the documents, or indicating the nature of the suggested injury to the interests of the public. The Privy Council, therefore, directed that the Supreme Court of

1. I.L.R. (1944) 1 Cal. 610.
2. (1945) I.L.R. 26 Lah. 219.
3. L.R. (1942) A.C. 624.
4. A.I.R. 1950 East Punjab 228 (F.B.).
5. L.R. (1931) A.C. 704.

South Australia should exercise its power under Order 31, rule 14, sub-rule (2) to inspect the documents, because it thought that the said course was less likely to cause delay than an order for a further and better affidavit of documents. The litigation in that case had been preceded by another litigation, and on the facts thus disclosed the Privy Council was satisfied that the action in question was one of a large number which were then pending, and against which a similar relief was claimed, all being alike dependant for success upon the establishment of the same facts. That is how full discovery by the respondent had become " the immediately vital issue between the parties. "

Dealing with the merits of the privilege the Privy Council cited with approval Taylor's observation that

> " the principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."[1]

Lord Blanesburgh, who delivered the judgment of the Board observed that it cannot be assumed that documents relating to trading, commercial or contractual activities of the State can never be claimed to be protected under this head of privilege ", but he added that " the cases in which this is so must, in view of the sole object of the privilege, and especially in time of peace, be rare indeed ". Then he referred to the fact that in view of the increasing extension of State activities into the spheres of trading business and commerce, and of the claim of privilege in relation to the liabilities arising therefrom which were frequently put forward, it is necessary for the Courts to remember that while they must duly safeguard genuine public interests they must see to it that the scope of the admitted privilege is not, in such litigation, extended. The judgment then proceeds to add that in truth the fact that documents if produced might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production—one only to be overborne by the gravest considerations of State policy or security. Then the power of the Court to call for the production of documents for which privilege was claimed was examined in the light of previous decisions, and in the light of the provisions of Order 31, rule 14, sub-rule (2). "Where, as in the present case", it was observed:

> "The State is not only sued as defendant under the authority of statute, but is in the suit bound to give discovery, there seems little, if any, reason why the Court in relation to this privileged class of its documents should have any less power than it has to inspect any other privileged class of its documents, provided of course, that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist."

The procedure which should be adopted in claiming the privilege was then considered, and it was held that the affidavit produced, which in its sweep covered no fewer than 1892 documents in number, was of the vaguest generality and as such unsatisfactory. The Privy Council then considered the question as to whether a further opportunity should be given to the State to make a better affidavit but it thought that it would be inexpedient to adopt such a course because it would involve further serious delay, " without, it may be, advancing any further the final solution to the question at issue ". That is why the Supreme Court was asked to exercise its power under the relevant rule to inspect the documents and then decide whether the privilege should be upheld or not. It is significant that even when giving such a direction their Lordships took the precaution of adding that the Judge, in giving his decision as to any document, will be careful to safeguard the interest of the State and will not, in any case of doubt, resolve the doubt against the State without further enquiry from the Minister. It only remains to add that so far as Australia is concerned it does not appear that there is any statutory provision corresponding to section 162 of the Act, and so, even after this judgment was pronounced by the Privy Council, Courts in India have not given effect to the operative part of the order in regard to the inspection of the document by Courts having regard to the statutory prohibition imposed by section 162 in that behalf.

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1. Taylor on " Evidence ". S. 939.

This pronouncement of the Privy Council was subsequently criticised by the House of Lords in *Duncan & another* v. *Cammel Laird & Co., Ltd.*[1]. It appears that the submarine *Thetis* which had been built up by the respondents under contract with the Admiralty was undergoing her submergence tests in Liverpool Bay, and, while engaged in the operation of a trial drive, sank to the bottom owing to the flooding of her two foremost compartments and failed to return to the surface with the result that all who were in her, except four survivors were overwhelmed. This unfortunate accident gave rise to a large number of actions against the respondents for damages for negligence. Pending the trial of the said claims the plaintiffs wanted discovery of certain specified documents to which the defendants objected, and the objection of the defendants was supported by Mr. Alexander who was the First Lord of the Admiralty in his affidavit made in that behalf. The documents to the production of which an objection was thus raised included (either in original or as a copy) the contract for the hull and machinery of the *Thetis* and other letters and reports. The Master before whom the objection was raised refused to order inspection. His decision was confirmed by Hilbery, J. sitting in Chambers, and the Court of Appeal unanimously confirmed the Judge's order. The plaintiffs, however, were given leave to appeal to the House of Lords ; that is how the matter reached the House of Lords.

Viscount Simon, L.C., who pronounced a composite judgment on behalf of himself and on behalf of Lord Thankerton, Lord Russell of Killowen and Lord Clauson, exhaustively considered the whole law on the subject of Crown Privilege ; and in his speech he made the categorical statement that in his opinion the Privy Council was mistaken in regarding the Australian rule of procedure as having any application to the subject-matter and in ordering the inspection of the documents which were in question before the Privy Council. Viscount Simon began his speech with the consideration of the previous decisions of the House of Lords, and held that the matter in substance was concluded by previous authorities in favour of upholding the objections. He observed that the common law principle is well established that, where the Crown is a party to a suit, discovery of documents cannot be demanded from it as a matter of right, though in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production would be made. As a result of the examination of the several decisions Viscount Simon deduced the principle which has to be applied in such cases in these words :

> " Documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (*a*) bv having record to the contents of the particular documents, or (*b*) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from produ-tion "

In this connection he stated that public interest may be damnified where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. Then he proceeded to examine the question as to whether when objection has been duly taken the Judge should treat it as conclusive ; and his answer was that an objection validly taken to production on the ground that this would be injurious to public interest is conclusive ; but of course, he proceeded to, make pertinent observations for the guidance of those who are entrusted with the power to make a claim. It would be noticed that even this decision would not be of material assistance to us because, as we have repeatedly pointed out, our decision must ultimately rest on the relevant statutory provisions contained in the Indian Evidence Act ; and so, the conclusion that a valid certificate issued by the Minister in charge is conclusive may not be strictly applicable to a claim for privilege similarly made by a Minister in charge in India. As we have already indicated, the preliminary enquiry contemplated by the first clause of section 162 has to be held by the Court, and it is after the Court has found in

1. L.R. (1942) A.C. 624.

favour of the character of the document pleaded by the State that the occasion arises for the head of the department to exercise his discretion conferred by section 123. Incidentally, we may point out that Lord Thankerton and Lord Russell of Killowen, who were parties to this decision, were also parties to the decision of the Privy Council in the case of *Robinson*[1].

In regard to the decisions in the cases of *Robinson*[1] and *Duncan*[2] respectively, it may be permissible to make one general observation. In both these cases the nature of the documents for which privilege was claimed, the time at which the dispute arose and the other surrounding circumstances were very unusual and special though in different ways, and so, as often happens, the shift in emphasis from one aspect of the same principle to another and the strong language used took colour from the nature of the special facts. Incidentally we may also add that the epilogue to the decision in *Robinson's case*[1] illustrates what untoward consequences may follow from any erroneous decision or a miscalculation as to the injury to public interest which may be caued by disclosure.*

Nearly five years after the judgment in *Duncan's case*[2] was pronounced, the Crown Proceedings Act (10 & 11 Geo. VI, clause 44) was passed in 1947, and the Crown Privilege recognised under the common law of England is now regulated by section 28 of the said Act. Section 28 which deals with discovery provides in substance that subject to the rules of Court in any civil proceedings there specified the Crown may be required by the Court to make discovery of documents and produce documents for inspection, and that in such proceedings the Crown may also be required to answer interrogatories. This legislative invasion of the Crown's prerogative is, however, subject to the proviso that the said section shall be without prejudice to any rule of law which authorises or requires the witholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to public interest. It would be noticed that section 28 read with the proviso confers on the Courts specified by it powers which are much narrower than those which are conferred on the Indian Courts under clause (1) of section 162 of the Act.

In the decision in *Duncan's case*[2] Viscount Simon had assumed that the law as laid down by the said decision was equally applicable to Scotland. This assumption has been seriously challenged by another decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board*[3]. In that case Viscount Simons has referred to a large number of earlier decisions dealing with the relevant law as it is administered in Scotland and commented on the decision in *Duncan's case*[2] by saying that the observations in the said case, in so far as they relate to the law of Scotland must be regarded as *obiter dicta.* " In the course of the present appeal ", added Lord Simons.

> " we have had the advantage of an exhaustive examination of the relevant law from the earliest ttmes, and it has left me in no doubt thae there always has been and is now, in the law of Scotland an inherent power of the Court to override the Crown's objections to produce documents on the ground that it would injure the public interest to do so "

though he added that " very rarely in recent times has this inherent right been exercised ". Lord Radcliffe, who agreed with the conclusion of the House with some reluctance, has made strong comments on the plea of privilege which is raised on behalf of the Crown in such matters. Adverting to the contention that the public interest may be injured by the production of the document Lord Radcliffe observed that more than one aspect of the public interest may have to be surveyed in reviewing the question whether a document which would be available to a party in a civil suit between private parties is not to be available to the party engaged in a suit with the Crown. According to

1. L.R. (1931) A.C. 704. 2. L.R. (1942) A.C. 624.

* For a graphic account of the aftermath of the enquiry held by the Supreme Court of South Australia, pursuant to the Privy Council's decision in *Robinson's case* L.R. 1931 S.C. 704, *see* " Law and Orders " by Sir C. K. Allen, 2nd Edition, page 374, foot-note 5-a.

3. (1956) Scots Law Times Reports 41.

Lord Radcliffe it was not unreasonable to expect that the Court would be better qualified than the Minister to measure the importance of such principles in application to the particular case that is before it. It is on that assumption that the Scottish Law has reserved to the Courts the duty of making some assessment of the relative claims of the different aspects of public interest where production of a document is objected to by the Crown. Then, in his characteristic style Lord Radcliffe has observed

> "I should think it a very great pity indeed if a power of this kind, a valuable power, came to be regarded as a mere ghost of theory having no 'practical substance, and the Courts abdicated by disuse in the twentieth century a right of control which their predecessors in the earlier centuries hove been insistent to assert".

The learned Law Lord has also made some strong comment on the formula which has been evolved by Viscount Simon in *Duncan's case*[1], and had stated that the phrase ""necessary for the proper functioning of the public service" is a familiar one, and I have a misgiving that it may become all too familiar in the future". The result of this decision appears to be that in Scotland, where the common law doctrine of the Crown Privilege is not strictly enforced, a privilege can be claimed by the Minister on grounds set forth by him in his affidavit. The certificate would be treated as very strong presumptive evidence of the claim made but the Court would nevertheless have inherent power to override the said certificate. It is unnecessary for us to consider the true nature and effect of this power because in India in this particular matter we are governed by the provisions of section 162 which confer power on Courts to determine the validity of the objection raised under section 123, and so there would be no occasion or justification to exercise any inherent power.

Though we do not propose to refer to the other decisions to which our attention was invited, we may incidentally observe that the decision in *Duncan's case*[1] has been followed by English Courts, but sometimes the learned Judges have expressed a sense of dissatisfaction when they are called upon to decide an individual dispute in the absence of relevant and material documents. (Vide *Ellis* v. *Home Office*[2]. Before we part with this topic we may also indicate that it appears that in the long history of reported judicial decisions only on three occasions the right to inspect documents has been either theoretically asserted or actually exercised in England. In *Hennessy* v. *Wright*[3] Field, J. observed that he would consider himself entitled to examine privately the documents to the production of which the Crown objected, and to endeavour by this means and that of questions addressed to the objector to ascertain whether the fear of injury to public service was the real motive in objecting. In point of fact, however, the learned Judge did not inspect the documents. From the judgment of the Court of Appeal in *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.*[4] it appears that Scrutton, J., had inspected the documents to the production of which an objection was raised. The learned Judge has, however, added that having seen the documents he thought that the government may be right in the view that they ought not to be produced to others, and that he would not take the responsibility of ordering them to be produced against the wishes of the government. In *Spigelmann* v. *Hocker & another*[5], Mr. Justice Macnaghten inspected the document to the production of which an objection was raised. The result of these decisions is that in England a valid certificate issued by the Minister in support of the privilege claimed is conclusive ; while in Scotland, though it would normally be treated as such, Courts reserve to themselves an inherent right to revise or review the certificate in a proper case.

It now remains to consider whether the High Court was right in holding that the privilege claimed by the appellant in respect of the four documents in question was not justified, and that takes us to the consideration of the relevant facts in the present appeal. The documents of which discovery and inspection were claimed are thus described by the respondent :

1. L.R. (1942) A.C. 624.
2. (1953) 2 All. Eng. Rep. 149.
3. (1888) L.R. 21 Q.B. 509.
4. L.R. (1916) 1 K.B. 822.
5. (1933-34) 1 Times L.R. 87.

(1) Original order passed by Pepsu Government on September 28, 1955, on the representation dated May 18, 1955, submitted by Sodhi Sukhdev Singh ;

(2) Original order passed by the Pepsu Government on March 8/9, 1956, reaffirming the decision passed on September 28, 1955, referred to above ;

(3) Original order passed by the Pepsu Government in their Cabinet Meeting dated August 11, 1956, revising their previous order on the representation of Sodhi Sukhdev Singh dated May 18, 1955 ; and

(4) Report of the Public Service Commission on the representation of Sodhi Sukhdev Singh dated May 18, 1955, after the Pepsu Government's decision on September 28, 1955.

In dealing with this question and in reversing the order passed by the trial Court by which the privilege had been upheld, the High Court has purported to apply the definition of the expression " affairs of State " evolved by Khosla, J., as he then was, in the case of *Governor-General in Council* v. *H. Peer Mohd. Khuda Bux and others*[1]: " It is, therefore, sufficiently clear " said the learned Judge, " that the expression " affairs of State " as used in section 123 has a restricted meaning, and on the weight of authority, both in England and in this country, I would define " affairs of State " as matters of a public nature in which the State is concerned, and the disclosure of which will be prejudicial to the public interest or injurious to national defence or detrimental to good diplomatic relations". It is this definition which was criticised by Mr. Seervai on the ground that it purported to describe the genus, namely, affairs of State, solely by reference to the characteristics of one of its species, namely, documents whose disclosure was likely to cause injury to public interest. Having adopted this definition the High Court proceeded to examine whether any injury would result from the disclosure of the documents, and came to the conclusion that it was difficult to sustain the plea that the production of the documents would lead to any of the injuries specified in the definition evolved by Khosla, J. On this ground the High Court allowed the contention of the respondent and directed the State to produce the documents in question.

We have already held that in dealing with the question of privilege raised under section 123 it is not a part of the Court's jurisdiction to decide whether the disclosure of the given document would lead to any injury to public interest ; that is a matter for the head of the department to consider and decide. We have also held that the preliminary enquiry where the character of the documents falls to be considered is within the jurisdiction and competence if the Court, and we have indicated how within the narrow limits prescribed by the second clause of section 162 such an enquiry should be conducted. In view of this conclusion we must hold that the High Court was in error in trying to enquire into the consequences of the disclosure ; we may add that the decison of the High Court suffers from the additional infirmity that the said enquiry has been confined only to the specified classes of injury specified by Khosla, J., in his definition which cannot be treated as exhaustive. That being so, we think the appellant is justified in complaining against the validity of the decision of the High Court.

Let us then consider whether the documents in question do really fall within the category of documents relating to " affairs of State ". Three of the documents the discovery of which the respondent claimed are described as original orders passed by the Pepsu Cabinet on the three respective dates. It is difficult to understand what was exactly meant by describing the said documents as original orders passed on those dates ; but quite apart from it the very description of the documents clearly indicates that they are documents relating to the discussions that took place amongst the members of the Council of Ministers and the provisional conclusions reached by them in regard to the respondent's representation from time to time. Without knowing more about the contents of the said documents it is impossible to escape the conclusion that these documents would embody the minutes of the meetings of the Council of Ministers and would indicate the advice which the Council ultimately gave to the Rajpramukh. It is hardly neces-

1. A.I.R. (1950) E.P. 228.

ary to recall that advice given by the Cabinet to the Rajpramukh or the Governor is expressly saved by Article 163, sub-article (3) of the Constituion ; and in the case of such advice no further question need to be considered. The same observation falls to be made in regard to the advice tendered by the Public Service Commission to the Council of Ministers. Indeed it is very difficult to imagine how advice thus tendered by the Public Service Commission can be excluded from the protection afforded by section 123 of the Act. Mr. Gopal Singh attempted to argue that before the final order was passed the Council of Ministers had decided to accept the respondent's representation and to reinstate him, and that, according to him the respondent seeks to prove by calling the two original orders. We are unable to understand this argument. Even if the Council of Ministers had provisionally decided to reinstate the respondent that would not prevent the Council from reconsidering the matter and coming to a contrary conclusion later on, until a final decision is reached by them and is communicated to the Rajpramukh in the form of advice and acted upon by him by issuing an order in that behalf to the respondent. Until the final order is thus communicated to the respondent it would be open to the Council to consider the matter over and over again, and the fact that they reached provisional conclusions on two occasions in the past would not alter the character of the said conclusions. The said conclusions, provisional in character, are a part of the proceedings of the Council of Ministers and no more. The report received by the Council from the Public Service Commission carries on its face the character of a document the disclosure of which would lead to injury of public interest. It falls in that class of document which " on grounds of public interest must as a class be withheld from production". Therefore, in our opinion, the conclusion appears inescapable that the documents in question are protected under section 123, and if the head of the department does not give permission for their production, the Court cannot compel the appellant to produce them. We should have stated that the two affidavits made by the Chief Secretary in support of the plea of the claim of privilege satisfied the requirements which we have laid down in our judgment, and no comment can be effectively made against them. The argument that in its pleadings the appellant accepted the description of the respondent that the document contained orders is hardly relevant or material. The affidavits show what these documents purport to be and that leads to the inference which irresistibly follows from the very description of the documents given by the respondent himself in his application by which he called for their production and inspection.

Before we part with this appeal we may incidentally refer to another point which was argued at some length before us by both the learned counsel for interveners. Mr. Viswanatha Sastri contended that the provisions of section 162 can be invoked only where a witness has been summoned to produce a document and a privilege is claimed by him in respect of it. According to him the said provisions cannot be invoked where the Court is called upon to decide the validity of the claim of privilege at the stage of inspection of the documents. In other words, where the State is a party to the suit and an application for inspection of documents is made against it by its opponent, and a claim for privilege is put forward by the State, the Court is entitled under Order 11, rule 19, sub-rule (2) to inspect the documents for the purpose of deciding as to the validity of the claim of privilege. That is the clear provision of Order 11, rule 19, sub-rule (2) and the power conferred on the Court by the said provision is not subject to section 162 of the Act. This position is seriously disputed by Mr. Seervai.

The procedural law in regard to discovery, production and inspection of documents is contained in Order 11, rules 12 and 21. It is true that Order 11, rule 19, sub-rule (2) provides that in dealing with a claim of privilege " it shall be lawful for the Court to inspect the document for the purpose of deciding the validity of the claim of privilege". The question is, what is the effect of this provision when it is considered along with section 162 of the Act ?

Before briefly indicating our conclusion on this point we may observe that this contention does not appear to have been raised in any judicial decisions to which our attention was drawn. Indeed it appears generally to have been assumed that in the matter of deciding a claim for privilege made by the State the provisions of section 162 of the Act would apply whether the said claim is made at the earlier stage of inspection or later when evidence is formally tendered. That, however, is another matter.

It is true that section 162 in terms refers to a witness who is summoned to produce a document and provides for the procedure which should be adopted and the powers which should be exercised in dealing with a privilege claimed by such witness ; but there is no doubt that the provisions of the Act are intended to apply to all judicial proceedings in or before any Court ; that in terms is the result of section 1 of the Act, and the proceedings before the Court under Order 11, rule 19, are judicial proceedings to which *prima facie* section 162 would apply. Similarly, section 4, sub-section (1) of the Code of Civil Procedure provides, *inter alia* that in the absence of any specific provisions to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force ; that is to say, in the absence of any provisions to the contrary the Evidence Act would apply to all the proceedings governed by the Code. Besides, it would be very strange that a claim for privilege to which Order 11, rule 19, sub-rule (2), refers is allowed to be raised under section 123 of the Act, whereas the procedure prescribed by the Act in dealing with such a claim by section 162 is inapplicable. If section 123 of the Act applies and a claim for privilege can be raised under it, *prima facie* there is no reason why section 162 should not likewise apply.

But apart from these general considerations the relevant scheme of the Code of Civil Procedure itself indicates that there is no substance in the argument raised by Mr. Sastri. Order 27 prescribes the procedure which has to be adopted where suits are filed by or against the government ; a plaint or written statement proposed to be filed by the government has to be signed under rule 1 by such person as the government may by general or special order appoint in that behalf, which means that the government can only act through its agent duly appointed in that behalf. The Minister who is the political head of the department or the Secretary who is its administrative head is not the government ; and so whenever the government sues or is sued and makes its pleadings it always acts through its duly authorised agents. The scheme of the relevant rules of Order 27 is consistent with this position.

Section 30 of the Code empowers the Court either on its own motion or on an application of a party to issue summonses to persons whose attendance is required either to give evidence or produce document, and to order that any fact may be proved by an affidavit. Order 4, rule 5 contemplates that, at the time of issuing the summons, the Court has to determine whether the summons should be for the settlement of issues only or for the final disposal of the suit ; and the relevant form of the summons (No. 1 in First Schedule, Appendix B) shows that in the case of a suit against the government of a State a summons can be issued to compel the attendance of any witness and the production of any document. This shows that where the State is a party a summons may have to be issued to its appropriate officer calling upon him to produce the documents for inspection. The provisions of rules 14, 15 and 16 of Order 11 show that affidavits have to be filed by the parties, and the filing of affidavits which is permitted by Order 19 is undoubtedly one mode of giving evidence. Order 16, rule 1 provides for the issue of a summons to persons whose attendance is required *inter alia* to produce documents; and rule 21 of the said Order expressly provides that where any party to a suit is required to give evidence or to produce a document the provsions as to witnesses shall apply to him so far as are applicable. Thus there can be little doubt that where a privilege is claimed at the stage of inspection and the Court is required to adjudicate upon its validity, the relevant provisions of the Act under which the privilege is claimed as well as the provisions of section 162 which deal with the manner in which the said privilege has to be considered are equally applicable ;

and if the Court is precluded from inspecting the privileged document under the second clause of section 162 the said prohibition would apply as much to a privilege claimed by the State through its witness at the trial as a privilege similarly claimed by it at the stage of inspection. It is hardly necessary to point out that a contrary view would lead to this manifestly unreasonable result that at the stage of inspection the document can be inspected by the Court, but not at the subsequent stage of trial. In our opinion, the provisions of Order 11, rule 19, sub-rule (2) must, therefore, be read subject to section 162 of the Act.

The result is that the appeal is allowed, the order passed by the High Court set aside and that of the trial Court restored with costs throughout.

Kapur, J.—I have read the judgment prepared by my learned brother Gajendragadkar, J., and agree with the conclusion but in my opinion the Court cannot take other evidence in regard to the nature of document, for which privilege is claimed, and my reasons are these :

In India the law of privilege in regard to official documents is contained in section 123 of the Indian Evidence Act which has to be read with section 162 of that Act. The various kinds of privileges claimable under the Evidence Act are contained in Chapter IX, two sections amongst these are sections 123 and 126, the former dealing with State privilege relating to "affairs of State" and the latter with communications with a legal adviser. In section 123 the opening words are "no Court shall permit........" and in the latter "no Barrister, etc., shall at any time be permitted........". In the other sections dealing with privilege the opening words are "no person shall be compelled........". This difference in language indicates that the Legislature intended to place the privilege of the State in regard to official documents on a different footing than the other forms of privileges mentioned in the Act in so far as it put a ban on the Court permitting any evidence of the kind mentioned in section 123 from being given, so that if, unwittingly any evidence mentioned therein was sought to be given, the Court would not permit it unless the other conditions were satisfied.

In section 123 the provision is against the giving of evidence which is derived from unpublished official records relating to any affairs of State except when the head of the department concerned in his discretion gives permission for the evidence to be given. The important words are "derived", "unpublished" and "affairs of State". The words "derived" means coming out of the source and therefore refers to original as well as secondary evidence of documents whether oral or documentary. The words "unpublished official records" are not very difficult of interpretation and must depend upon the circumstances of each case. If the record is shown to have already been published, it ceases to be an unpublished record. But the difficulty arises as to the meaning of the words "affairs of State", because the ban is put on evidence derived from official documents relating to affairs of State. At the time when the Indian Evidence Act was enacted, affairs of State were confined to governmental or political activities of Government, but with the expanding of the activities of the State, which, because of the changed concept of the State, comprise also socio-economic, commercial and industrial activities the words "affairs of State" must necessarily have a much wider meaning than it originally had. But the language of the sections remains the same and so also the limitation on the giving of evidence derived from such documents and therefore what was considered to be within the discretion of the head of the department to disclose or not to disclose still remains within his discretion and merely because the scope of the words "affairs of State" had been extended, the extent of the discretion has not thereby decreased or become limited and the words "who shall give or withhold such permission as he thinks fit" indicate that the discretion to remove the ban vests in the head of the department and no one else.

The real difficulty arises in the interpretation of the words "affairs of State" What are they ? How is the meaning of the words to be determined and by whom ? When a claim is made by a proper authority in a proper form, is that conclusive

of the nature of the document or has the Court to proceed to determine the efficacy of the claim by taking other evidence as to its nature or the effect of its disclosure. It was contended that the decision, whether the document belongs to the category falling within the expression " affairs of State " or not has to be of the Court and not of the official mentioned in the section. In a way that is correct because the conduct of the trial must always remain in the hands of the Court but what is implied in the contention raised was that the Court must first decide whether the document belongs to the class comprised in the expression " affairs of State " and then the official concerned may give or withhold his consent. It was also submitted that in order to enable the Court to determiine the validity of the claim of privilege the official concerned, when making the claim, may have to state the nature of the document or at least the nature of the injury to the public interest or to the efficient working of the public service, as the case may be, which the disclosure of the document or evidence derived therefrom would result in.

Section 162 of the Evidence Act was relied upon in support of the above contention. That section applies to all documents in regard to which claim of privilege of any kind may be claimable including that falling under section 123 and therefore the language of section 162 had necessarily to be wide. It has been described as not being clear by Bose, J., as he then was, in *Bhaiya Saheb* v. *Ram Nath Rampratap Bhadupote*[1]. The section requires a witness summoned to produce a document to bring it to the Court in spite of any objection which he may take to its production or to its admissibility and the Court is empowered to decide both the questions. It is the next part which is relied upon in support of the contention that the Court can take other evidence to decide both the questions of production and the question of admissibility. The words are "the Court, if it sees fit may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility ". It was argued that this part of the section empowered the Court to take other evidence not only to decide the question of admissibility of the document but also its production. The language of this part of the section does not lend support to this contention because it gives discretion to the Court to inspect the document or take other evidence to enable it to determine the admissibility of the document. The interposing of the words " unless it refers to matters of State ", has reference to privilege under section 123 and therefore it disentitles the Court to inspect the document. The sequence envisaged by the section is that a witness summoned to produce a document is bound to bring it to the Court. He may then take objection to its production under any of the sections, *viz.*, 121 to 131 or he may object to its admissibility and both these objections have to be decided by the Court. Then comes the second part of the section. If the document refers to " matters of State "—there is no distinction in the meaning of the word " matters " and " affairs of State "—then the Court may not inspect the document, but if the document is not of that class, then the Court can inspect it and if it finds any objection to the admissibility, it may take other evidence to determine its admissibility. To take a concrete case, if a document is produced which is compulsorily registerable and it is not so registered, it would not be admissible in evidence under section 49 of the Registration Act, but evidence may be led as to its admissibility for certain purposes, *e.g.*, section 53-A of the Transfer of Property Act. If it refers to that class of documents then the second part of section 16 becomes applicable, *i.e.*, the Court may inspect the document which will help it in deciding the question of privilege and admissibility. But if a claim is properly made by a proper official on the ground that it refers to matters of State, the Court will stay its hands and refrain from inspecting it. The words "or to take . . . . . its admissibility" on their plain language do not apply to production and consequently the taking of evidence must have reference to the admissibility of the document.

All the High Courts in India are in accord that the Court will not inspect the document if it relates to matters of State. If that is so it would be difficult to sus-

1. I.L.R. (1940) Nag. 240 at 247.

tain the contention that it can decide the question whether the matter relates or does not relate to affairs of State. If the original cannot be inspected, no other evidence can be produced as to its contents. The effect of this prohibition is not only as if the document had been destroyed, but as if it never existed. If that is the position, then it becomes difficult to see how the question of its production can be decided by the Court by taking other evidence or how the Court can decide whether a particular document falls within the prohibition imposed by section 123 of the Evidence Act. In this connection the words of Lord Kinnear in *The Lord Commissioner of the Admiralty* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*[1], are quite apposite. It was there said :

> " I think it is not improbable that even if an officer of the department were examined as a witness, we should not get further forward, because the same reasons which induced the department to say that the report itself ought not to be produced might be thought to preclude the department from giving explanation required."

If the Court cannot inspect the document, if no secondary evidence can be given as to its contents and if the necessary materials and the circumstances which would indicate the injury to the public interests or detriment to the proper functioning of the services cannot be before the Court it cannot be in a position to decide whether the document relates to affairs of State or not and the logical conclusion would be that the Court is debarred from overruling the discretion of the head of the department concerned, because the Court cannot say whether the disclosure or non-disclosure would be detrimental or not. If, on the other hand, the contention is accepted that the Court can decide by taking other evidence as to whether the document relates to the affairs of State then the discretion to ban its production by the head of the department must necessarily become illusory. If the Court takes upon itself the task of deciding the nature of the document, then it will be taking upon itself the very grave duty of deciding a vital question as to what are the affairs of State without having the necessary material before it or without knowing the exigencies of the public service or the effect of the disclosure of the State secret or how far the disclosure will injure the public interests and it may thus unwittingly become the instrument of giving publicity to something which the head of the department considered injurious to the public interests, the law having given to the head of the department concerned to make this determination. No doubt the discretion is wide and covers all classes of documents which may fall within the phrase " affairs of State ", some noxious and others innocuous and may even appear to be unduly restrictive of the rights of the litigant but if that is the law the sense of responsibility of the official concerned and his sense of fair play has to be trusted. The second part of section 162 therefore cannot be said to permit the taking of other evidence, *i.e.*, other than the document to determine the question of its production when it is of the category falling under section 123. That part does not entitle the Court to determine the nature of the document or the adequacy of the reasons which impelled the proper official to claim privilege. It would be relevant to quote the observations of Isaacs, J., in *Marconi's Wireless Telegraph Co.* v. *The Commonwealth*[2] :

> " I distinctly adverted to the necessary fact that the right of discovery given to the litigant for the furtherance of public justice must be subject to the still higher consideration of the general welfare that the order to make proper discovery does not destroy the privilege of public interest, and that the ground of public policy may intervene and prevent the injury to the community which coercive disclosure might produce. If that were not so, every gun in every fort and every safe in the Treasury would be open through the medium of the Court to the observation of any plaintiff of any nationality who could make a *prima facie* case of the infringement to which it was relevant. One of the authorities to which I referred in that connection was the judgment of Turner, L J. in *Wadeer* v. *East India Co.*[3], and that judgment is, I think, of great value in this case also ".

It will be helpful to refer to the law on the subject in England as laid down in English cases because the basis of the Indian Law is the law of that country. The question of privilege has been described by Viscount Simon L.C. in *Duncan* v. *Cammel Laird & Co., Ltd.*[4], as a question of high constitutional importance because it involves a

1. (1909) S.C. 335 at 343.
2. 16 C.L.R. 178 at 201.
3. 8 D.M. & G., 182 at p. 191.
4. L.R. (1942) A.C. 624.

claim by the Executive Government to restrict the material which might otherwise be available for the Court trying the case and this desciption was repeated by the House of Lords in the Scottish case *Corporation of Glasgow* v. *Central Land Board*[1]. It may be the material which a party to the litigation may desire in its own interest and without which equal justice may be prejudiced. This question of privilege may not only arise in cases where the State is party to the suit but may equally arise where the contestants in a suit are private parties and whether as a party to the suit or not the State may decline to produce a document. In *Duncan's case*[2], the privilege of the Crown though it was described as not a happy expression, was upheld on the ground that the interest of the State must not be put in jeopardy by the production of a document which would injure it and which is also a principle to be observed in administering justice, " quite unconnected with the interests or claims of the particular parties in litigation and, indeed, is a rule upon which the Judge should, if necessary, insist even though no objection is taken at all". The sort of grounds to afford justification for withholding the documents were given by Viscount Simon as follows :—

> " It would not be a good ground that, if they were produced the consequences might involve the department or the Government in Parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. In a word, it is not enough that the minister or the department does not want to have the document produced. The minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, *e.g.*, where disclosure would be injurious to national defence, or to good diplomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service."

Thus the documents, which are protected from production, are those the production of which would be prejudicial to the public interests or those which belong to that class which as a matter of practice, are kept secret for the proper maintenance of the efficient working of the public service.

Objection has been taken to the authority of this rule enunciated by Viscount Simon, L.C. on the ground that it is in serious conflict with another principle that the proper administration of justice is also a matter of public interest, *i.e.*, "*fiat justitia ruat caelum*" but as was said by Viscount Simonds in *Glasgow Corporation* v. *Central Land Board*[1], " The paramountcy of the public interest has been recognized and preserved ". This principle, which was re-enunciated by Viscount Simon, L.C. had been the law of England for over a century before *Duncan's case*[2]. In *Earl* v. *Vass*[3], it was held that public officers are not entitled or compellable to produce written communications made by them officially relative to the character and conduct of a party applying for a public office when the production is demanded in an action for damages against the writer. Lord Eldon, L.C. at page 230 observed :—

> " I apprehend, in all cases in which it has been held, upon the principle of public policy, that you shall not be compellable to give evidence of, or produce such instruments—that is, wherever it is held you are not on grounds of public policy, to produce them—you cannot produce them and that it is the duty of the Judge to say you shall not produce them........"

Lord Eldon referred with approval to the decision in *Home* v. *Lord William Bentinck*[4], which was of the year 1820. The principle there laid down was that production of instruments and papers must be shut out if it was against public policy. At page 919 the learned Chief Justice said :—

> " It seems therefore that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed ; and therefore, independently of the character of the Court, I should say, on the broad rule of public policy and convenience that these matters, secret in their nature, and involving delicate enquiry and the name of persons stand, protected".

The injury to public service was recognized in *Beatson* v. *Skene*[5], where Pollock, C.B., said :

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1. (1956) S.C. 1 (H.L.).
2. L.R. 1942 A.C. 624.
3. (1822) 1 Sh. Sc. App. 229.
4. (1820) 129 E.R. 907.
5. 157 E.R. 1415.

"It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the papers; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it. The administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of Justice) subordinate to the general welfare of the community. If indeed, the head of the department does not attend personally to say that the production will be injurious but sends the documents to be produced or not as the Judge may think proper, or as was the case in *Dickson* v. *The Earl of Wilton*[1] before Lord Campbell (reported in Foster and Finlason's N.P. Rep., p. 425), where a subordinate was sent with the document with instructions to object but nothing more, the case may be different."

Martin, B. did not entirely agree with the view of the other three learned Barons and he was of the opinion that if the document could be produced without prejudice to public service he ought to compel its production notwithstanding the reluctance of the head of the department to produce it. It was pointed out by Pollock, C.B., that this might apply to extreme cases and "extreme cases throw little light on the practical rules of life."

In *Smith* v. *East India Company*[2], which related to a commercial transaction as to the liability to pay freight a similar privilege was upheld. It was argued that communications between officials and communications between Directors and Board of Control were official correspondence and were privileged. On appeal the Lord Chancellor held that in order that superintendence and control should be exercised effectively and for the benefit of the public it was necessary that unreserved communication should take place between the East India Company and the Board of Control.

In *Homer* v. *Ashford*[3], which was of the year 1825 Best, C.J., said :—

"The first object of the law is to promote public interst; the second to preserve the rights of individuals".

In this connection it may not be out of place to recall the striking language of Knight Bruce, V.C. quoted at page 401 of *Macintosh* v. *Dun*[4], in the judgment of Lord Macnaughten :—

"Truth like other good things, may be loved unwisely—may be pursued too keenly—may cost too much". And then he points out that the meanness and the mischief of prying into things which are regarded as confidential, with all the attending consequences, are "too great to pay for truth itself".

Thus the law as stated in these old English cases shows that what was injurious to the public interest or prejudicial to the proper functioning of the public services was not to be disclosed and if the objection was based on these grounds it must prevail. As to who was to determine this, the Judge or the official, Pollock, C.B., decided in favour of the official because the enquiry could not be held in private and if it was held in public the mischief would have been done: *Beatson* v. *Skene*[5].

It was with this background of the state of the English law that Sir James Fitzjames Stephen drafted the law of evidence which was enacted into the Indian Evidence Act (I of 1872).

Scrutton, J., in *Asiatic Petroleum Company, Ltd.* v. *Anglo-Persian Oil Company, Ltd.*[6], which was a case between private parties inspected the document to the production of which objection was taken, and having seen it he said that he would not take the responsibility of ordering it to be produced against the wishes of the Government. When the matter was taken in appeal, Swinfen Eady, L.J., was of the opinion that the rule was not confined to documents of political or administrative character. The foundation of the rule was that the information cannot be disclosed without injury to the public interest and not that the document was confidential or official, and that if the production would be injurious to the public service, the general

1. (1859) 1 F. & F. 419 : 175 E.R. 790.
2. 41 E.R. 550.
3. (1825) 130 E.R. 537 at 539.
4. L.R. 1908 A.C. 390 (401).
5. 157 E.R. 1415.
6. L.R. (1916) 1 K.B. 822.

public interest must be considered paramount to the individual interest of the suitor. This was a document which was written by the defendants, who owned a pipeline from Persia to their refinery in the Persian Gulf, to their agents in Persia which contained confidential information from the Board of Admiralty.

The Scottish cases have also upheld the privilege of the Crown in regard to production although it has been stated that the inherent power of the Court to itself see the document and to override but not to review the certificate of the official of the department concerned has always existed in Scottish Courts. In *Duncan's case*[1], Viscount Simon, L.C., quoted with approval the observation of Lord Dunedin, the Lord President in the *Lord Commissioner of the Admiralty* v. *The Aberdeen Steam Trawling & Fishing Co., Ltd.*[2]. That was a case where a Government department objected to the production of the document on the ground that the production would be prejudicial to public services and it was held that the view of the Government department was final and the Court will refuse production even in action in which the Government department was a party. The objection there was taken on an affidavit. At page 340, the Lord President (Dunedin) said :—

"It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is very strong step indeed for the Court to overrule that statement by the department. The Lord Ordinary has thought that it is better that he should determine the question. I do not there agree with him, because the question of whether the publication of a document is or is not detrimental to the public service depends so much upon the various points of view from which it may be regarded, and I do not think that the Court is in possession of these various points of view. In other words, I think that, sitting as Judges without other assistance, we might think that something was innocuous, which the better informed officials of the public department might think was noxious. Hence, I think the question is really one for the department, and not for your Lordships".

And Lord Kinnear agreed with Lord Dunedin and at page 343 said :—

"I agree that we cannot take out of the hands of the Department the decision of what is or what is not detrimental to the public service. There are only two possible courses. We must either say that it is a good ground of objection or we must overrule it altogether. I do not think that we should decide whether it would be detrimental to the public service or not ; and I agree with what both your Lordships have said as to the position of the Court in reference to that question. We do not know the conditions under whkch the production of the document would or would not be injurious to the public service. I think it is not improbable that even if an officer of the Department were examined as a witness we should not get further forward, because the same reasons which induced the Department to say that the report itself ought not to be produced might be thought to preclude the Department from giving the explanations required. A department of Government, to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind for itself, and therefore I agree we ought not to grant the diligence".

In a later Scottish case *Hendersen* v. *M'Gown*[3], where in a suit between private parties income-tax returns were sought to be produced, the Court held that it had the power, in the exercise of its discretion, to order production of documents in the custody of a public department in spite of its objection but in the circumstances it did not order production as it was unnecessary. Lord Johnston said at page 826 :—

"That is not to say that the Court never can and never will overrule such a statement but merely that it would be a very strong step, and therefore a step for which the Court would require very grave justification. The Admiralty and the War Office are charged with the duty of providing for the safety of the realm, and, if either say that the production of a document in their hands would be prejudicial to the public interest, I think that we should naturally implicitly accept the statement. But there are distinctions between public departments. The interest of such a department as the Inland Revenue is that the public should be able to rely on all returns to them and communications made to them being treated as confidential. This also is the public interest."

The latest Scottish case relied upon is a decision of the House of Lords in *Glasgow Corporation* v. *Central Land Board*[4]. In that case privilege was claimed by the Central Land Board on the ground that its production would adversely affect the public interests. The question for decision was whether Scottish Courts were bound to give effect to the certificate of the Secretary of State or whether the Court had an

1. L.R. (1942) A.C. 624.
2. (1909) S.C. 335.
3. (1916) S.C. 821.
4. (1956) S.C. 1 (H.L.).

inherent jurisdiction not to review the certificate but to override it. The House of Lords was of the opinion that *Duncan's case*[1], did not affect the Law of Scotland and the Scottish Courts, possessed the inherent power to override the objections of the Minister and it did not exclude the Court from making an order of production but in that case the power was not exercised. Viscount Simonds, L.C. said at page 10 that *Duncan's case*[1], had settled that according to the Law of England an objection validly taken to production of documents on the ground that this would be injurious to the public interest is conclusive but to cite the case of *Lords Commissioners of the Admiralty*[2], as authoritiative without regard to the earlier cases and the later case of *Henderson* v. *M'Gown*[3], must give an imperfect view of the law of Scotland. But even in Scotland the power had been rarely, very rarely, exercised by the Courts; its exercise had been refused even where the result had been the prejudice of the private individual and the paramountcy of the public interest had been recognised and preserved. (p. 11). Lord Normand observed that for a 100 years the uniform track of authority asserted the inherent power of the Court to disregard the Crown's objection but the power had been seldom exercised ; only the Courts had emphatically said that it must be used with the greatest caution and only in special circumstances. In this connection Lord Normand said at page 16 :—

" It was also a firmly established rule that the Courts could not dispute the certificate and that the question whether prduction wuld be contrary to public interest was for minister or the department concerned."

Lord Radcliffe in his speech said that *Duncan's case*[1], ought not to be treated as a decision which affected the law of Scotland. Dealing with the case before the Court and the power reserved to the Court to overrule the Crown objection he said at page 18 :—

" I do not undertand that the existence of the power involves that in Scotland, any more than in England, it is open to the Court to dispute with the Minister his view that production would be contrary to the public interest is well founded or to arrive at a view, contradictory of his that production would not in fact be at at all injurious to that interest. If weight is given to the argument that the Minister in forming his view may have before him a range of considerations that is not open to the Court and that he is not under any obligation to set out these condiderations in public, I think that it must follow that the Minister's view must be accepted by the Court as incapable of being displaced in by its own opinion ". The view expressed in *Admiralty Commissioners* v. *Aberdeen*[2] was dissented from.

After referring to another aspect of public interest that impartial justice should be done in the Courts of law, not least between citizen and Crown, Lord Normand observed :

" If in the past the power to disregard the objection has hardly ever been exercised, that hsa been due, I think, to a very proper respect for the Crown's position and to a confidence that objections of this nature would not be advanced, or at any rate persisted in, unless the case was one in which production would involve material injury to the public welfare."

Thus, as was said by Lord Normand, there is a difference between the law of England and the law of Scotland on an important constitutional question. But in practice the difference was little as the exercise of the inherent power by the Scottish Courts had been rare.

As the Privy Council judgment in *Robinson's case*[4], was from Australia it will be useful to refer to two Australian cases :—

In *Marconi's Wireless Telegraph Company Ltd.* v. *The Commonwealth*[5], where inspection was claimed of wireless telegraph apparatus, Isaacs, J., in his minority judgment at page 205 enunciated the following propositions which are relevant for the purpose of the present case :—

" (1) The rule of exclusion of State secrets applies, necessarily without distinction to the facts documents and other objects. This was admitted by Mr. Irvine, and is established by such cases as *R.* v. *Watson*[6] ; *R.* v. *Hardy*[7] ; *R.* v. *Watson*[8].

1. L.R. (1942) A.C. 624.
2. (1909) S.C. 335 at 343.
3. (1916) S.C. 821.
4. L.R. (1931) A.C. 704.
5. 16 C L.R. 178.
6. 2 Stark 116 at 148.
7. 24 St. Tri. 199 at Col. 753.
8. 32 St. Tri. 1 at Cols. 100-101.

(2) The rule proceeds on the same grounds whether the parties called on to produce the documents, &c., are or are not parties to the suit, that is, on the grounds of the prejudice to the public interests, which production would occasion (per Turner, L.J. in *Wadeer's case*[1]; *Admiralty Commissioners* v. *Aberdeen Trawling Co.*[2].

(3) The right to protection depends upon the " character " of the documents, &c., (*ib.*).

(4) If the documents, etc., are *prima facie* private, as where they are in private hands then in the absence of Ministerial claim for protection, the Court, in case of objection by the private defendant on the ground of public policy, will ascertain their character that is, whether they are really governmental and, if they are, the next succeeding paragraph applies : *Smith* v. *East India Company*[3].

(5) If the documents, etc., are of a political that is, a governmental " character " , then even in the absence of any Ministerial claim for protection, it is the duty of the Court, on objection by private person holding them, to ascertain whether public prejudice will or may ensue from production, and, if it appears that public policy requires confidence between the objector and the Government, they are presumed *prima facie* to be confidential : *Smith* v. *East India Company*[3], and per Wills, J., in *Hennessy* v. *Wright*[3].

(6) If either by proof or undisplaced presumption confidence is required, then it is a rule of law, not of discretion, that the documents shall be excluded : *Marks* v. *Beyfus*[4]; *Stace* v. *Griffith*[5].

(7) If the documents, etc., are in fact " State documents " , that is, "in possession of a Government department " , and the Minister having custody of them assures the Court that public prejudice will or may ensue from production, that, in the absence of what are called extreme cases and are practically negligible, is conclusive evidence of their character, that is, that they are confidential public documents, and that such prejudice will or may ensue, and the Court must act upon it : *Stace* v. *Griffith*[6] ; *Beaston* v. *Skene*[7]; *The Bellerophon*[8] ; *Hughes* v. *Vargas*[9] ; Halsbury's Laws of England, Vol. XI, p. 85 ; Taylor on Evidence, 10th edition, pages 673, 674 ; Powell on Evidence, 9th edition, page 273. Conclusiveness in such a case is not unique. Even a private claim for privilege in an ordinary affidavit of documents is (with certain exceptions immaterial here), taken as conclusive with respect even to the grounds stated for claiming privilege ; *See* Halsbury's Laws of England, Volume XI, page 61 and *Morris* v. *Edwards*[10].

The learned Judge dealing with the matter of privilege in public interest and the principles based on prevention of injury to the community observed at page 203 :—

" Such a doctrine is inherent in all systems of law ; for the first requirement of every organised society is to live, and so far as possible to live securely, and the next is to live with the greatest advantage to the community at large ; and to these essentials the strict administration of justice in particular cases amongst members must yield. "

Thus the principle is that private inconvenience must yield to public interest ; in other words *fiat justia ruat coelum* is not always the right of a suitor because the proper maxim applicable is *salus populi suprema est lex* which transcends all other considerations. The majority of the Court in that case had held that there was nothing to warrant the conjecture that the inspection could disclose anything that could reasonably be called secret in any sense of the word. The matter was taken to the Privy Council but Special Leave to appeal was refused. The Lord Chancellor there said :—(See *Griffins case*[11] at page 386).

" Of course the Minister's statement or certificate must be conclusive on a particular document. How can it be otherwise ?........................If the Minister certifies quite specifically, his certificate is to be taken as conclusive. The ground on which Special Leave to appeal was refused in that case appears to have been that, having regard to the form of the order, which carefully limited the right of inspection and reserved liberty to apply, it was not a convenient case in which to raise a great question of principle."

In *Griffin* v. *The State of South Australia*[11], objection to the production for inspection of documents was upheld on the ground that the statement of the Attorney-General for the State that their production for inspection would be prejudicial to the public interest is conclusive. That was a case in which inspection of documents was sought in an action brought in the High Court of Australia by the plaintiff against the State of South Australia to recover damages for negligent storage of wheat. Knox, C.J., in the course of his judgment referred to the observations of

1. S.D.M. & G. 1882.
2. (1909) Sess. Ca., 335.
3. 1 Ph. 50.
4. L.R. 21 Q.B.D. 509, 518-519.
5. L.R. 25 Q.B.D. 494 at pages 498, 500.
6. L.R. 2 P.C. 420 at page 428.
7. 5 H. & N. 838.
8. 44 L.J. Adm. 5.
9. 9 R. 661.
10. L.R. 15 App. Cas. 309.
11. 36 C.L.R. 378.

the Lord Chancellor in *Marconi's case*[1], which have been quoted above. Isaacs, J., reiterated his previous opinion. Starke, J., was doubtful and he was of the opinion that there was no reason why the Courts should not use the power confided in them for discovery. If some real doubt was established as to the accuracy of the Minister's statement there was no reason for refusing the power in a proper case particularly when the commercial activities of the Government were becoming more and more extensive and the sphere of political and administrative action correspondingly wider. He was also of the opinion that the Courts should be able to fully protect the public interests and do nothing to imperil them. The learned Judge in that particular case was not fully satisfied with the affidavit of the Minister.

The matter of privilege in Australia was taken to the Privy Council in *Robinson* v. *State of South Australia*[2]. This case arose out of an action similar to *Griffin's case*[1] and a similar privilege was claimed. The Privy Council was of the opinion that the Minister's minute was inadequate to support the claim of privilege but it had not been lost by the inefficiency of the form in which it was claimed and the matter was a proper one for the Court to exercise its power of inspection for which privilege was sought in order to determine whether their production will be prejudicial to public interest or to the efficient working of the public services.

Lord Blanesburgh said at page 714 :—

> " As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production: See *Asiatic Petroleum Company* v. *Anglo-Persian Oil*[3] and *Smith* v. *East India Company*[4]".

and at page 715 it was observed :—

> " It must not be assumed from these observations of the Lord Justice that documents relating to the trading, commercial or contractual activities of a State can never be claimed to be protected under this head of privilege. It is conceivable that even in connection with the production of such documents there may be " some plain overruling principles of public interest concerned which cannot be disregarded. " "

After referring to various cases that have been set out above the Privy Council was of the opinion that the Court was entitled to prescribe in any particular case the manner in which the claim of privilege should be made. It may accept unsworn testimony of the Minister in one case but in another where the circumstances seem to be to so require call for an affidavit from him. It may be that objection merely on ground of public policy may not be sufficient but it ought to appear that the mind of a responsible Minister had been brought to bear on the question of expediency in the public interest of giving or refusing the information asked for. This would be a guarantee that the opinion of the Minister which the Court is asked to accept is one which has not been expressed inadvisedly or as a matter of mere departmental routine but is one put forward with the solemnity necessarily attaching to the sworn statements and that the privilege could not be asserted in relation to documents the contents of which had already been published. In that particular case the Minister had merely stated that he had considered this mass of documents and not that he had read them and considered each one of them. Lord Blanesburgh said at page 722 :—

> " In view specially of the fact that the documents are primarily commercial documents, he should have condescended upon some explanation of the particular and far from obvious danger or detriment to which the State would be exposed by their production. Above all, and especially in view of the last paragraph of the minute, the claim was one which should have been put forward under the sanction of an oath by some responsible Minister or State official. "

Continuing it was observed that there may be some among the scheduled documents to which privilege may be genuinely attached and to give inspection of which without more would destroy the protection of the privilege and therefore it would or might

1. 16 C.L.R. 178 at page 201.
2. L.R. (1931) A.C. 704.
3. L.R. (1916) 1 K.B. 822, 829-830.
4. 1 Ph. 50.

be contrary to public interest to deprive the State of opportunity of regularising its claim to protection. The Board would have given this advice had it not been for the fact that it would have involved serious delay without advancing further the final solution of the question. The case was therefore remitted to the Supreme Court with a direction that it was a proper one for the exercise by that Court of the power of inspecting documents. The Privy Council was careful to add that the Judge in giving his decision as to any document would safeguard the interests of the State and would not resolve the doubt against the State without further enquiring from the Minister. In that case also the paramountcy of the consideration of public interest was recognized but as the privilege was not properly claimed and the document related to commercial activities of the State and it would have involved unnecessary prolongation of the action the Privy Council remitted the case for the Court to exercise its power of inspection under the Rules and Orders of the Court but with the further direction of safeguarding the interest of the State.

In *Duncan* v. *Cammel Laird & Co.*[1], the Court of Appeal held that the affidavit of the First Lord of Admiralty was conclusive if it stated that such production would be contrary to public interest, and the order for production was therefore refused. Du Parcq, L.J., pointed out that the Privy Council case (*Robinson's case*[2]), was not the final word on the subject in regard to production. The House of Lords in appeal did not agree with the judgment of the Privy Council and it is significant that two of the seven Law Lords in the House of Lords were parties to the Privy Council judgment. The House of Lords held that the affidavit of the Minister was conclusive and that inspection of a document by a Court in private would be communicating with one party to the exclusion of the other and it accepted the priniple that if it was prejudicial to the public interests or the document belonged to that class of documents which are kept secret for the proper functioning of the public services the production of the document would be refused. It was recognized in that case that it is the Judge who is in control of the trial and not the executive but the proper ruling for the Judge to give would be that an objection validly taken to the production on the ground of its being injurious to public interest is conclusive.

The English cases which were decided after the pronouncement of the House of Lords in *Duncan's case*[1], naturally followed the decision of the House of Lords. In *Eliis* v. *Home Office*[3], where a prisoner who had been attacked in jail by another prisoner who was a mental case asked for certain reports and privilege was claimed. The privilege was upheld but it was said that although it was essential that Government department should be entitled to claim privilege against disclosure of documents on the ground of public interest the ambit of privileges should be carefully scrutinized and each documents should be examined. It may be mentioned that in that case Devlin, J., felt grave concern about the claim of this privilege because the result was that documents were to be treated as destroyed and no secondary evidence could be led and this concern of the trial Judge was shared by the Court of Appeal. In *Broome* v. *Broome*[4], which was a defended suit for divorce, the wife wanted certain documents of the Solidiers' Sailors' and Airmen's Families Association but the Secretary of State issued a certificate in which he stated that the production would not be in public interest. It was held that Crown privilege from disclosure attached to all documents irrespective of where they originated or in whose custody they reposed provided that they had emanated from or came into the possession of some servant of the Crown.

In *Auton* v. *Rayner and others*[5], it was pointed out at page 572 that the sole concern of the Minister was whether the interests of the State in the sphere for which he was responsible would be affected and therefore the documents or evidence should be withheld from the Court. It was added that the Minister should accept and recognize that the proper administration of justice would be impeded or may be unattainable if any document or any evidence was withheld. In that case an action

1. L.R. (1942) A.C. 624.
2. L.R. (1931) A.C. 704
3. (1953) 2 A.E.R. 149.
4. (1955) 1 A.E.R. 201.
5. (1958) 3 A.E.R. 566.

was brought against the defendants, one of whom was a Police Officer, charging them with conspiracy to injure and defraud him, false imprisonment and malicious prosecution. The documents required by the plaintiff were reports made by the Police Officer to his superior officers and the communication which passed between the Metropolitan Police Force and other Police Force and the Secretary of State swore an affidavit indicating that the document should be withheld from production and that he had formed an impartial judgment that in the public interest and for the proper functioning of the public services the document should be withheld. The Court of Appeal held that the determination of the Secretary of State ought reasonably to be accepted and that the affidavit was, in the circumstances, conclusive.

The law in England may thus be summed up :—

(1) That a document need not be produced for inspection either on discovery or at the trial when objection is taken by the Minister that disclosure of the document would be contrary to public policy or detrimental to public interest or services. This privilege attaches irrespective of where the document originates or in whose custody it is provided it emanated from or came into possession of some servant of the Crown ;

(2) the privilege can be claimed or waived by the authority of the Minister or the head of the department ;

(3) secondary evidence may not be given of a document for which privilege is established ;

(4) official correspondence *per se* is not privileged on the ground of its being confidential or official nor is it a valid ground that production would involve the Government in criticism or expose want of efficiency in the aministration or open up claims to conpensation but the ground for privilege is that the production would be detrimental to the interest of the public or interference with the efficient working of the public service or it belongs to class of documents which it is the practice of the department to keep secret ;

(5) the Minister's objection may be conveyed by a letter or by the official who attends at a trial but the Court may require an affidavit and or the attendance of the Minister ;

(6) before a privilege is claimed it is desirable that each document should be examined by the department concerned and inspection permitted of all documents which cannot harm the public interest ;

(7) if a Minister claims privilege the Court will accept his statement and ought not to examine the document to see if the objection is well founded ;

(8) public interest must not be put in jeopardy by the production of a document which could injure it and the Court should, if necessary, prohibit the production even though no objection has been taken by the Government department.

It may be pointed out that the privilege was expressly reserved when by the Civil Proceedings Act, 1947, the Crown was made liable to give discovery in civil proceedings.

It is no doubt true and it must be recognized that the administration of public justice is also a part of public interest but as was pointed out by Viscount Simon, L. C., in *Duncan's case*[1], the interest of the State is the interest of the citizen and if the former suffers the interest of the litigant also suffers and therefore public interest transcends the individual interest of a citizen. In *Duncan's case*[1], it was emphasised that the Minister in deciding whether it was his duty to object should bear in mind the considerations which justify withholding production, *i.e.*, the public interest would otherwise be damnified, *i.e.*, the disclosure would be injurious to national

1. L.R. (1942) A.C. 624.

defence, or to good dipolomatic relations or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. And that is the safeguard which both in England and India the law seems to have found sufficient for the protection of an individual's rights. Even in Scotland where the inherent rights of the Courts to overide official discretion has been recognized the occasions for the exercise of that power have indeed been rare and even in the latest case *Glasgow Corporation* v. *Land Board*[1], that position was reiteiterated.

Although the concensus of opinion in India is that under the second part of section 162 the Court will not inspect the document if it relates to matters of State yet there is a track of decision which has taken the view that it is not for the head of the department claiming the privilege but for the Court to decide whether the document falls within the category mentioned in section 123. But in some other cases a different view has been taken. A reference to cases which fall on both sides of the line will be helpful.

In *Irwin* v. *Reid*[2], Mukherjea, A.C.J., held that the language of section 123 showed that the Court cannot be invited to discuss the nature of the document and the public official concerned and not the Court is to decide whether the evidence referred to shall be given or withheld.

If any other view were taken, the mischief intended to be averted would take place, as the Judge could not determine the question without ascertaining the contents of the document, and such inquiry, if it did take place must, for obvious reasons, take place in public : *Beatson* v. *Skene*[3] *Hennessy* v. *Wright*[4], *Jehangir* v. *Secretary of State*[5]. The result practically is, that if the objection is raised by a proper authority the Court cannot compel disclosure by primary or by secondary evidence."

The Lahore High Court in *Khawja Nazir Ahmad* v. *Emperor*[6], held that the head of the department who is in possession of the documents is the sole judge of the fact whether the documents should be protected from production on the ground of their being related to affairs of State and therefore though the decision would be that of the Court, it would have to rule in favour of the privilege claimed by the head of the department. It was also held that the interests of the State must not be put in jeopardy by production of documents which would injure them and that was a principle to be observed in administering justice and indeed a rule on which the Judge should insist even though no objection is taken at all. In that case there were certain confidential files of the Special Enquiry Agency containing notes, correspondence, etc., relating to the case and containing a record of statements of various persons and a proper affidavit had been filed by the head of the department stating that the production would be injurious to public interests. Abdul Rahman, J., said:

" I feel convinced in my mind that the objection as to its production apart from it admissibility (*e.g.*, for want of registration or contravening the rule as to when secondary evidence of a document can be admitted—if the document is merely a copy and not original) can only be decided by its inspection by the Court followed as it must necessarily have been by an order for its production, although not in the sense of its contents having been disclosed to the party summoning the document at any rate at that stage. If the Court is debarred under the statute from inspecting it, I cannot see how the objection as to its production can otherwise be decided".

In *I. M. Lal* v. *Secretary of State*[7] this privilege was upheld. In that case it was held that section 162 divided the privilege of documents into two categories. At page 212 Abdul Rashid, J., (as he then was) observed :—

" The Court can inspect documents for the purpose of deciding the question of privilege only if those documents do not refer to matters of State. In other words an exception is made in respect of documents that refer to matters of State. Such documents cannot be inspected by the Court while all other documents for which privilege is claimed are open to inspection by the Court for the purpose of deciding the validity of the objection regarding privilege. "

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1. (1956) S.C. 1 (H.L.).
2. I.L.R. 48 Cal. 304.
3. 5 H. & N. 838 : 157 E.R. 1415.
4. (1888) L.R. 21 Q.B.D. 509.
5. (1903) 6 Bom. L.R. 131, 160.
6. I.L.R. (1945) Lah. 219.
7. A.I.R. 1944 Lah. 209.

The Bombay High Court In re *Mantubhai Mehta*[1] in construing sections 123, 124 and 162 has held that the officer summoned to produce the document is bound to bring it and if he takes objection to its production it is for the Court to decide whether the objection is well-founded or not but the Court is not entitled to inspect it. This track of reasoning suffers from the same difficulty that has been pointed out that without looking at the document and taking into consideration the wide words of section 123 it becomes difficult to hold that the Court can decide as to whether the document relates to " affairs of State " and whether it should or should not be produced. In that Bombay judgment the learned Judge referred to the observations of Viscount Simon, L.C., in *Duncan's case*[2]. Besides the learned Judge also referred to section 124 the effect of which is not the same as of section 123 of the Evidence Act. Bhagwati, J. (as a Judge of the Bombay High Court) in *R. M. D. Chamarbaghwala* v. *Y. R. Parpia*[3] held that the Court cannot inspect the document in order to determine whether they are unpublished official records relating to any affairs of State, but its jurisdiction to determine is not taken away by section 162 and it is for the Court to decide the question of production by taking all the circumstances into consideration barring inspection of the document. The learned Judge mainly referred to *Robinson's case*[4] and it appears that the learned Judge was not satisfied as to the documents being unpublished but the criterion he laid down was that only such documents are privileged which relate to affairs of State and the disclosure of which would be detrimental to public interest. The question really is the same as to who is to decide whether it is " matters " of " affairs of State".

The Calcutta High Court in a later judgment in *Ijjat Ali Talukdar* v. *Emperor*[5], took a contrary view different from its older view and held that the Court is to decide whether conditions precedent to sections 123 and 124 have been established. That was a case under the Excise Act and the Excise Commissioner was called upon to produce certain documents. The Commissioner claimed privilege under section 123 on the ground that the files contained unpublished official records relating to affairs of State and Das, J., as he then was, was of the opinion that the occasion for claiming privilege under section 123 arose when it was sought to give evidence derived from unpublished official records relating to any public affairs which was a condition precedent. He then referred to section 124 of the Evidence Act. The second part of section 162 provided the method or means to enable the Court to decide the question, namely, by inspecting the document or by taking other evidence. Although the Court was disentitled from inspecting the document, the duty of deciding the question was still on the Court. At page 419 the learned Judge observed :—

" In case of documents relating to affairs of State it may be difficult for the Court to decide the question, yet it need not be necessarily impossible for the Court to do it. Ordinarily no difficulty will arise, because heads of departments or public officers are not expected to act capriciously and ordinarily the Court will accept their statement. If necessary, the Court will require the officer to claim the privilege in the manner indicated in the Judgment of Lord Blanesburgh in the Australian case. If, however, the Court finds that an over-zealous officer is capriciously putting forward a claim of privilege the Court will decide, as best as it can, by the means available to it, whether the claim is well-founded."

As has already been said above the second part does not afford the means or methods to the Court to decide the question of privilege. The only method is inspection and that is denied to the Court in cases falling under section 123.

The second case which is on the other side of the line is the judgment of Bose, J., as he then was, in *Bhaiya Saheb* v. *Ramnath Ramapratap Bhadupote*[6]. In that case the learned Judge was of the opinion that the insertion of the words " unless it refers to matters of State " in the middle of the paragraph seemed to indicate that the Court might not inspect the document in respect of which the privilege was claimed until it had opportunity of determining upon its admissibility and for that purpose it could take other evidence which meant evidence other than the document produced. This line of reasoning is similar to that adopted in *Ijjat Ali's case*[5].

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1. I.L.R. (1945) Bom. 122.
2. L.R. (1942) A.C. 624.
3. A.I.R. 1950 Bom. 230.
4. L.R. (1931) A.C. 704.
5. I.L.R. (1944) 1 Cal. 410.
6. I.L.R. (1940) Nag. 240 at page 247.

The Andhra Pradesh High Court in *Public Prosecutor, Andhra* v. *Damera Venkata Narasayya*[1], was of the opinion that when an objection under section 123 is taken the Court has no power to inspect the document but may take other evidence for the purpose of deciding the objection and if it comes to the conclusion that the evidence will be derived from the unpublished records relating to the affairs of the State the objection will have to be upheld and it will be left to the head of the department to give or withhold the permission and the criterion for the head of the department was whether or not the disclosure would cause injury to public interest and he was the sole Judge of the matter with which the Court cannot interfere. This case does not support the contention of the respondent.

The Patna High Court in *Lakhuram Hariram* v. *The Union of India*[2], held that the head of the department must first examine the document and he may then raise an objection but he is not absolved from the obligation of appearing in Court and satisfying the Court that the objection taken is valid and the Court may require him to give an affidavit or further questions may be put in regard to the validity of the claim but the Court is not entitled to inspect the document.

A. P. Srivastava, J., in *Tilka and others* v. *State*[3], held that under section 162 of the Evidence Act the Court may inspect a document unless it relates to affairs of State and in such a case it will have to take other evidence relating to the nature of the document.

The words of section 123 are very wide ; and the discretion to produce or not to produce a document is given to the head of the department and the Court is prohibited from permitting any evidence to be given which is derived from any unpublished documents relating to affairs of State. Section 162 does not give the power to the Court to call for other evidence which will indicate the nature of the document or which will have any reference to the reasons impelling the head of the department to withhold the document or documents. In the very nature of things when the original cannot be looked at and no secondary evidence is allowable the Court will only be groping in the dark in regard to the nature of the document or the evidence. The correct way of looking at the Indian statute, therefore, is to interpret in the manner which is in accord with the English law, *i.e.*, the Court has not the power to override ministerial certificate against production.

It is permissible for the Court to determine the collateral facts whether the official claiming the privilege is the person mentioned in section 123, or to require him to file proper affidavit or even to cross-examine him on such matters which do not fall within the enquiry as to the nature of the document or nature of the injury but he may be cross-examined as to the existence of the practice of the department to keep documents of the class secret but beyond that ministerial discretion should be accepted and it should neither be reviewed nor overruled.

For these reasons I concur in the decision that this appeal must be allowed.

Subba Rao, J.—I have perused the judgments prepared by my learned brethren, Kapur and Gajendragadkar, JJ. I agree with them in maintaining the claim of privilege in regard to the three items described as " original orders " passed by the PEPSU Government, but regret my inability to agree with them in regard to the report of the Service Commission.

This appeal raises the question of the scope and content of the law of privilege attached to affairs of State and the procedure to be followed for ascertaining it. The facts are fully stated in the said judgments and I need not restate them ; but I would prefer to give my own reasons for my conclusion.

It would be convenient at the outset to clear the ground. The arguments at the Bar have covered a wide field, but we are not concerned here with the law of privilege pertaining to the field of discovery and inspection of documents. We

1. (1957) 1 An.W.R. 106 : (1957) M.L.J. (Crl.) 19: I.L.R. (1957) Andh. Pra. 174.
2. A.I.R. 1960 Pat. 192.
3. A.I.R. 1960 All. 543.

are called upon only to decide its scope during the trial of a suit when a witness, who is summoned to produce a document, claims privilege on the ground that the document relates to affairs of State. I should not be understood to have expressed any opinion on the difficult question whether when the defendant is a State, the Court is not entitled to inspect the documents under Order 11, rule 19 (2), Code of Civil Procedure.

The question falls to be considered on a true construction of two of the provisions of the Indian Evidence Act, 1872 (hereinafter called the Act), namely, sections 123 and 162. They read :

Section 123 : " No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit. "

Section 162 : " A witness summoned to produce a document shall, if it is in his possession or power, bring it to the Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence; and if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code (XLV of 1860). "

The relevant parts of the foregoing sections may be summarised thus : Section 123 prohibits the giving of any evidence derived from unpublished official records relating to affairs of State except with the permission of the officer at the head of the department ; while section 162 enjoins on a witness summoned to produce a document to bring it to Court and empowers the Court to decide on the validity of any objection raised in respect of its production or admissibility. The argument of the Advocate-General is that the words " affairs of State " mean " the business of State ", and, therefore, evidence derived from any unpublished official document relating to that business cannot be given as evidence except with the permission of the head of the department concerned, and that the Court under section 162 of the Act must automatically accept the affidavit filed by the head of the department claiming such a privilege. Learned counsel for the respondent, on the other hand, defines the words " affairs of State" only to take in documents whose production would be against public interest, confines the power of the head of a department to permit or withhold the user of such a document in evidence, and sustains the Court's power to decide the question of privilege in respect of such a document on relevant materials without inspecting the document.

The crucial words in section 123 are, " unpublished official records relating to any affairs of State ". Under that section no one shall be permitted to give any evidence derived from such records except with the permission of the officer at the head of the department concerned. The words " affairs of State " have not been defined. Though in section 123 the words used are " affairs of State ", in section 162 the words used are " matters of State". There does not appear to be any practical difference between the two sets of words. In Shorter Oxford Dictionary, 3rd edition (1956), " matter " has been defined as " a thing, affair, concern " and " affairs of State " as " public business ". These dictionary meanings do not help to decide the content of the said words. The content of the said words, therefore, can be gathered only from the history of the provision. It has been acknowledged with some exceptions that the Indian Evidence Act was intended to and did in fact consolidate the English Law of Evidence. It has also often been stated with justification that Sir James Stephen has attempted to crystallise the principles contained in Taylor's work into substantive propositions. In case of doubt or ambiguity over the interpretation of any of the sections of the Evidence Act we can with profit look to the relevant English common law for ascertaining their true meaning. In English common law the words " affairs of State " do not appear.

The basis of the doctrine of Crown privilege is the injury to the public interests. The Judicial Committee in *Robinson* v. *State of South Australia*[1], says at page 714,

"The principle of the rule is concern for public interest, and the rule will accordingly be applied no further than the attainment of that object requires."

The House of Lords in *Duncan* v. *Cammell Laird & Co.*[2], restated the same idea when it observed that the State should not withhold the production of documents except in cases where the public interest would otherwise be damnified.

The earlier decisions of the English Courts indicate that the Crown privilege was sustained only in regard to documents pertaining to matters of administration, defence, and foreign relations whose disclosure would be against the public interest: see *Home* v. *Lord F.C. Bentinck*[3], *Smith* v. *The East India Company*[4] and *Beatson* v. *Skene*[5].

The decisions of the High Courts in India over a long period of time consistently gave the same meaning to the said words. It may also be stated that in and about the time when the Evidence Act was passed, the concept of a welfare State had not evolved in India and as such the words "affairs of State" could not have been, at that time, intended to take in the commercial or the welfare activities of the State. But when the words are elastic there is no reason why they should not be so construed as to include such activities also, provided the condition of public injury is also satisfied. It is, therefore, clear that the words "affairs of State", have acquired a secondary meaning, namely, those matters of State whose disclosure would cause injury to the public interest.

The learned Advocate-General contends that this construction, if accepted, would give a meaning to the provisions of section 123 of the Act which would be contrary to its tenor. He classifies documents relating to "affairs of State" into noxious and innocuous documents and contends that documents, whose disclosure would affect the public interest, are noxious documents and that if the records which relate to the affairs of State mean only noxious documents, the said construction would bring out a result directly opposite to that contemplated by the section. When the section intends to prohibit the disclosure of noxious documents, the argument proceeds, the construction enables their disclosure if the head of the department permits it. Shortly stated his contention is that the expression "affairs of State", that is, business of State, is the genus and the document, the disclosure of which is against the public interest, is the species, and that the head of the department is only empowered to permit the disclosure of documents falling outside the said species. This argument is apparently logical and rather attractive, but it is an over-simplification of the problem and is based upon a disregard of the legislative history and the long track of decisions of this country. If accepted, it enlarges the scope of the said privilege to such an extent that in effect and substance the control of the admissibility of documents shifts from the Court to the State or its subordinate officers, for every document relating to the business of State would be a privileged document unless the head of the department in his discretion permits the giving of evidence derived therefrom. Nor can I accept the .construction that an absolute privilege is attached to every noxious document, *i.e.*, to every State document the disclosure of which may cause injury to the public interest. This is giving too narrow a meaning to the words "public interest". If the non-disclosure of a particular State document is in public interest, the impartial and even dispensation of justice by Courts is also in public interest. They are indeed two aspects of public interest. There is no conflict or dichotomy between the two. In particular circumstances one aspect may be paramount and in a different set of circumstances the other may be given precedence. In the last analysis, it is the question of balancing of the two aspects having regard to the circumstances of a particular case. The head of a department may as well permit the disclosure of a

1. L.R. (1931) A.C. 704.
2. L.R. (1942) A.C. 624.
3. 129 E.R. 907.
4. 41 E.R. (Ch.) 550.
5. (1860) H. & N. 838: 157 E.R. 1415.

document even if ordinarily its disclosure affects public interest, if in his opinion the counter-balancing circumstances are in favour of disclosure rather than non-disclosure. I cannot, therefore, give a narrow meaning to the words " records relating to affairs of State " so as to take in every unpublished document pertaining to the entire business of State, but confine them only to such of the documents whose disclosure would be injurious to public interest.

The next question is, who is empowered to decide the said question whether a particular document relates to affairs of State ?—whether it is the Court or the State. That is found in section 162 of the Act. The learned Advocate-General contends that the first part of section 162 makes a distinction between the production of a document and the admissibility of a document and that the first limb of the second part of the section provides for the production of a document and the second limb for its admissibility. He illustrates his argument thus : privilege may be raised in respect of production of a document on the ground that it pertains to matters of State, or on the ground that it is inadmissible for want of registration, deficiency of stamp, or similar other defects. The first clause of the second part of section 162, the argument proceeds, enables the Court to inspect a document when the objection is to its production unless the document refers to a matter of State, and the second clause thereof empowers the Court to take evidence only when the objection is not to its production but to its admissibility. If this contention be accepted, it will lead to an anomaly, for grammatically construed the two limbs of the second part can be applied only to the question of admissibility and in that event, on the hypothesis suggested by the learned counsel, the Court will be entitled to look into a document even if it relates to a matter of State if the objection is only to its production and not to its admissibility. The more reasonable construction of the section is to give a wider meaning to the word "admissibility" so as to comprehend both production as well as admissibility, for the question of admissibility arises only after the document is produced and a party seeks to get it admitted in evidence. In this view, the second part of section 162 can only mean that when an objection is raised either to the production or to the admissibility of a document, a Court can inspect the document and if it thinks necessary other evidence may be taken to decide on the objection raised. By the express terms of the section the Court is precluded from inspecting a document if it refers to matters of State. But in other respects the jurisdiction of the Court to decide on the objection raised is not different from that it possesses in respect of other privileged documents.

If so understood there cannot be any ambiguity in the scope of section 162 of the Act. It says in express terms that when an objection is raised to the production of a document or to its admissibility, the validity of any such objection shall be decided by the Court. The second part of the section states the material on the basis of which such an objection can be decided. It can either inspect the document or take other evidence to enable it to decide the validity of any objection raised. The only limitation in the case of a document referring to matters of State is that the Court cannot inspect it. It is implicit in the limitation that in the case of documents pertaining to matters of State the Court is precluded not only from inspecting the documents but also from permitting parties to adduce secondary evidence of their contents. "The other evidence" must necessarily be *de hors* the contents of the documents.

Even in England there is no divergence of view on the quesion who has to decide, when an objection to the production of a document is raised on the ground of privilege, the validity of the objection. In *Robinson's case*[1], the Judicial Committee observed at page 716 thus :

> " The result of the discussion has been. . . . . .where in effect he concludes that the Court has in those cases always had in reserve the power to inquire into the nature of the documents for which protection is sought, and to require some indication of the nature of the injury to the State which would follow its production. The existence of such a power is in no way out of

1. L.R. (1931) A.C. 704.

harmony with the reason for the privilege provided that its exercise be carefully guarded so as not to occasion to the State the mischief which the privilege, where it exists, is designed to guard against.'

The House of Lords in *Duncan's case*[1], also recognised this power though it whittled down its scope by holding that the Judge had to accept automatically the affidavit filed by a minister. Viscount Simon, L.C., states at page 642 as follows :

" Although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the judge. . . . . It is the Judge who is in control of the trial, not the executive, but the proper ruling for the Judge to give is as above expressed. "

On the other hand, in Scotland the inherent right of Courts to override official discretion is recognized. The House of Lords in *Glasgow Corporation* v. *Land Board*[2], gave a clear exposition of the law of the country. Viscount Simonds derives the principle of the Court's power from the fact that the fair administration of justice between subject and subject and the Crown is a public interest of higher order and the protection is the care of the Courts. Lord Radcliffe finds it on the doctrine that the interest of the Government for which the minister should speak with authority does not exhaust the public interest, for another aspect of that interest is seen in the need that impartial justice should be done in Courts of law. These judgments of the high authority also recognised the fact that it is the Court that has to decide an objection raised by the State on the ground of privilege. There is a strong current of Indian decision taking the same view ; see *Khawja Nazir Ahmad* v. *Emperor*[3] ; In re *Mantubhai Mehta*[4]; *R.M.D. Chamarbaugwala* v. *Y.R. Parpia*[5]; *Ijjat Ali Talukdar* v. *Emperor*[6] ; *Bhaiya Saheb* v. *Ramnath Rampratap Bhadupote*[7], *Public Prosecutor, Andhra* v. *Damera Venkata Narasayya*[8], *Lakhuram Hariram* v. *The Union of India*[9], *Tilka* v. *State*[10]. In a few cases a different view is expressed. It may, therefore, be stated without contradiction that the preponderance of authority is in favour of a Court deciding the question of State privilege.

Some objections are raised in decided cases in England and restated in *Duncan's case*[1] against conferring such a power on Courts. Apart from the fact that the statute expressly confers such a power, there are no merits in the objections raised. The objections are : (i) the Judges are not well qualified to appreciate the highly technical matters which may arise with regard to some kinds of State secrets ; (ii) if a Judge is allowed to decide on evidence the question of privilege, it may prejudice a fair trial ; and (iii) it is a first principle of justice that the Judge should have no dealings on the matter on hand with one litigant save in the presence of and to the equal knowledge of the other. The objections raised have no substance. The first objection, if accepted, disqualifies a Judge from deciding complicated technical questions that arise before him. A Judge is trained to look at things objectively and can certainly decide, without inspecting the documents in the material supplied whether the production of a document will affect the public interest having regard to the circumstances of each case. Nor are there any merits in the second objection. In the words of Sir C.K. Allen, a Judge worthy of his office can put out of his mind all issues except those which are raised and decided by the forensic process. It is common place that a Judge is trained to decide a case only on the admissible evidence actually adduced before him and not on any extraneous considerations. The third objection also has no basis in fact. So long as a Judge takes care to rule out any question on the contents of a document in respect whereof privilege is claimed, he can certainly decide the question in the presence of both the parties. The objections have, therefore, no substance. On the other hand, there is every reason why the duty to decide on the question of State privilege must be left to a Judge and not to the State. That is the reason why the legislature

1. L.R. (1942) A.C. 624.
2. (1956) S.C. (H.L.) 1.
3. I.L.R. (1945) Lah. 219.
4. I.L.R. (1945) Bom. 122.
5. A.I.R. 1950 Bom. 230.
6. I.L.R. (1944) 1 Cal. 410.
7. I.L.R. 1940 Nag. 240.
8. (1957) 1 An. W.R. 106 : (1957) M.L.J. (Crl.) 19 : I.L.R. (1957) A.P. 174.
9. A.I.R. 1960 Pat. 192.
10. A.I.R. 1960 All. 543.

rightly conferred that power on the Court. A Judge is as much a part of a department of the State as an executive officer. But unlike the executive officer, a Judge is trained to decide cases objectively not only between individuals *inter se* but also between the State and individuals. He can, therefore, be trusted to decide impartially on the question whether the production of a document in a case will affect the public interest. State documents in a secretariat, I presume, will be looked into by many officers dealing with the said documents, sometimes from the lowest to the highest in the department. It would be unrealistic to suggest that the disclosure of a State document to any one of those officers would not affect the public interest whereas the decision of its character by a Judge would do so. It is, therefore, the duty of the Court, whenever an objection is raised on the ground of State privilege to decide on relevant evidence whether the document relates to affairs of State.

Even if the wide construction of the words " affairs of State ", namely, business of State, be accepted, the result will not be different. The section says that no one shall be permitted to give any evidence derived from unpublished official records relating to affairs of State, except with the permission of the officer at the head of the department concerned. The expression " affairs of State " in its ordinary significance is of the widest amplitude and will mean the entire business of State. It takes in the routine day-to-day administration and also highly confidential acts involving defence and foreign relations, and also in modern times the multifarious activities of a welfare State. The object of the section is simply to prohibit the user of undisclosed documents of State in evidence by persons who in the course of their duties deal with or look into those documents, without the permission of the officer at the head of the department concerned. The words used in the section "as he thinks fit" confer an absolute discretion on the head of the department to give or withhold such permission. The section does not lay down that the head of the department concerned should refuse permission only if the disclosure injures public interests, though ordinarily he may refuse permission on such matters affecting the State. One can visualise a situation when the officer in exercise of his absolute discretion refuses to give permission for the use of not only noxious documents but even of innocuous ones. The only limitation on his power is his reason and experience. The absolute discretion is capable of giving rise to mistake or even conscious abuse. The section does not really involve any doctrine of State privilege but is only a rule of commonsense and propriety. If the officer gives permission, there is an end of the matter ; but, if he refuses, the party affected may take out necessary summons to the State Government to produce the document. The State Government may depute one of its officers to produce the document in Court. Then only the occasion for rasing the question of privilege arises and section 162 governs that situation. An overriding power in express terms is conferred on a Court under section 162 of the Act to decide finally on the validity of the objection raised on the ground of privilege. The Court will disallow the objection if it comes to the conclusion that the document does not relate to affairs of State or that the public interest does not compel its non-disclosure, or that the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. This conclusion flows from the fact that in the first part of section 162 of the Act there is no limitation on the scope of the Court's decision, though in the second part the mode of enquiry is hedged in by conditions. In England, in the absence of a provision or a rule of common law similar to that of section 162, there was room for conflict of views on the scope of the Court's power. On the other hand in Scotland, the common law corresponding to section 162 was invoked and the House of Lords recognised the inherent power of the Court to reject a claim of privilege if the Court comes to a conclusion that the paramount interest of the administration of justice demands or compels such a disclosure. Section 162 of the Act in terms confers a similar power on Courts and though it may have to be used with circumspection, it is a real and effective power. There is no conflict between section 123 and section 162 of the Act : the former confers a power on a head of a department to withhold permission from the standpoint of State adminis-

tration, whereas section 162 recognizes the overriding power of a Court in the interest of higher public interest to overrule the objection of privilege.

The next point is, what is the procedure to be followed by a Judge for deciding on the said objection? When an officer of the State is summoned as a witness to produce a document, if the State seeks to take a plea of privilege then it is the duty of the minister in charge of the department concerned to file an affidavit at the first instance. The affidavit so filed shall *ex facie* show that the minister concerned has read and considered each of the documents in respect of which the privilege is claimed. It shall also contain the general nature of the document and the particular danger to which the State would be exposed by its production. If the Court is not satisfied with the contents of the affidavit, to enable it to decide whether the document in question refers to the affairs of State, it can summon the minister to appear as a witness. In effect and substance the said procedure has been suggested in *Robinson's case*[1] at page 722. The same procedure is also indicated in *Duncan's case*[2] at page 638. In the second case above referred, Viscount Simon, L.C., says at page 638 thus:

> "If the question arises on subpoena at the hearing it is not uncommon in modern practice for the minister's objection to be conveyed to the Court, at any rate in the first instance, by an official of the department who produces a certificate which the minister has signed, stating what is necessary. I see no harm in that procedure, provided it is understood that this is only for convenience and that if the Court is not satisfied by this method, it can request the minister's personal attendance."

It may be suggested that this procedure may cause some inconvenience to the minister concerned. But if one realises that every act of the exercise of the right of privilege detracts from the fair disposal of a case before the Court and that the administration of justice is also part of the general conduct of the affairs of any State and that its impartiality and purity are as important as any other public interest, one will also appreciate that the requirement of the personal attendance of a minister, if necessary, to support his affidavit would be to a large extent a guarantee against unjust objections that may otherwise be raised. It is suggested that an affidavit of the head of a department, such as the Secretary, would do as well as that of a minister, but there is an essential distinction between a Secretary and a minister: the former may be frequently tempted to take the opposite view, particularly in cases where a claim against the State seems to him to be harsh or unfair, while the latter, being the political head subject to parliamentary control, may be expected, if he carefully scrutinises a particular document, not to take such objection which obstructs the cause of justice unless absolutely necessary. I would, therefore, hold that the affidavit which states that a particular document relates to affairs of State must be sworn to only by a minister in charge of the department wherefrom the document or documents are summoned.

The next point, is what are the well-established rules which help the Court to decide whether a particular document pertains to affairs of State or not? The following relevant rules may be extracted from the decision of the Judicial Committee in *Robinson's case*[1]; (1) the privilege is a narrow one most sparingly to be exercised; (2) the principle of the rule is concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires; (3) as the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character; (4) its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official which alone is no reason for their non-production; (5) even in the case of documents relating to the trading, commercial or contractual activities of a State, it is conceivable that there may be some plain overruling principle of public interest concerned which cannot be disregarded; though in times of peace such cases must be very rare. The House of Lords in *Duncan's case*[2] has laid down the following negative and positive tests for deciding the question of privilege of the State.

1. L.R. (1931) A.C. 704.
2. L.R. (1942) A.C. 624.

The negative tests are : (1) it is not a sufficient ground that the documents are State documents or official or marked confidential ; (2) it would not be a good ground that, if they were produced, the consequences might involve the department or the government in parliamentary discussion or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere ; (3) neither would it be good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claim of compensation. The positive test is, where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service. The last test has given rise to mild but definite protests within the limits of judicial propriety by the learned Judges who had the occasion to deal with the question of privilege and to vehement protests from jurists. Sir C.K. Allen, in his book " Law and Orders " (2nd edition), has observed at page 384 thus :

> "Everybody is agreed that public security and foreign relations are necessary heads of privilege. Both are wide in scope, and it is doubtful whether any other ' head ' needs to be specified. . . . It would be of great advantage if statute could put an end to the pernicious doctrine that privilege can be claimed for classes of documents."

The argument of the learned Advocate-General is based, upon an apprehension, which in my view is unfounded, that the Court may always refuse the affidavit of a minister and insist on his personal attendance. The unpublished documents relating to defence, foreign relations and other documents of great public importance rarely come before municipal Courts. Occasionally documents of day-to-day administration of the State may be relevant evidence, but very often documents pertaining to mercantile or welfare activities of the State would be summoned to establish a particular claim. In the case of documents of undoubted public importance, when the minister swears to an affidavit that in his discretion their production is against public interest, it may reasonably be expected that the Judge would accept the statement. But the real difficulty is in the case of other documents, where the interests of private individuals and the State come into conflict, the Judge should be in a position to examine the minister and others to ascertain by evidence collateral to the contents of the documents whether the assertion of the minister is justified.

The aforesaid discussion yields the following propositions: (1) Under section 162 of the Evidence Act the Court has the overriding power to disallow a claim of privilege raised by the State in respect of an unpublished document pertaining to matters of State ; but in its discretion, the Court will exercise its power only in exceptional circumstances when public interest demands, that is, when the public interest served by the disclosure clearly outweighs that served by the non-disclosure. One of such instances is where the public interest served by the administration of justice in a particular case overrides all other aspects of public interest. (2) The said claim shall be made by an affidavit filed by the minister in charge of the department concerned describing the nature of the document in general and broadly the category of public interest its non-disclosure purports to serve. (3) Ordinarily the Court shall accept the affidavit of a minister, but in exceptional circumstances, when it has reason to believe that there is more than what meets the eye, it can examine the minister and take other evidence to decide the question of privilege. (4) Under no circumstances can a Court inspect such a document or permit giving of secondary evidence of its contents. (5) Subject to the overriding power of the Court to disallow the claim of privilege in exceptional cases, the following provide working rules of guidance for the Courts in the matter of deciding the question of privilege in regard to unpublished documents pertaining to matters of State : (*a*) " records relating to affairs of State" mean documents of State whose production would endanger the public interest ; (*b*) documents pertaining to public security, defence and foreign relations are documents relating to affairs of State ; (*c*) unpublished documents relating to trading, commercial or contractual activities of the State are not, ordinarily, to be considered as documents relating to affairs of State ; but in special circumstances they may partake of that character ; (*d*) in cases of documents men-

tioned in (c) *supra*, it is a question of fact in each case whether they relate to affairs of State or not in the sense that if they are disclosed public interest would suffer.

Bearing the aforesaid principles in mind, I shall construe the nature of the documents in respect of which privilege is claimed in the present appeal. The so called order of the PEPSU Government is really the minutes recorded in the course of cabinet discussions. Under Article 163 (3) of the Constitution, the question whether any, and if so what, advice was tendered by ministers to the Governor shall not be inquired into in any Court. In view of the constitutional protection, and the reason underlying such protection, I hold that in the present case the District Court was right in sustaining the claim of privilege in regard to the said document.

In regard to the report of the Service Commission, on the assumption that it is a relevant document, I cannot see how public interest suffers by its disclosure. Service Commission is a statutory body constituted with definite powers conferred on it, under the Constitution. Under Article 320 (3) (c) of the Constitution the State Public Service Commission shall be consulted on all disciplinary matters affecting a person serving under the Government of a State. This is one of the constitutional protections conferred on public servants. I cannot visualize how public interest would suffer if the report submitted by the Service Commission to the Government is disclosed, and how the disclosure of such a report prevents the Service Commission from expressing its views on any other case in future passes my comprehension. It may expose the Government if it ignores a good advice ; but such an exposure is certainly in public interest. The Constitution does not put a seal of secrecy on the document ; nor, in my view, public interest demands such secrecy. In a conflict between the administration of justice and the claim of privilege by the State, I have no hesitation to overrule the claim of privilege.

Before closing, I must notice one fact. In this case, the Chief Secretary filed an affidavit. But, in my view, the minister should have done it. The respondent did not object to this either in the District Court or in the High Court. In the circumstances, I would not reject the claim of privilege on the basis of this procedural defect.

In the result, I would allow the appeal in respect of the minutes of the cabinet and dismiss it in other respects. As the parties have succeeded and failed in part, I direct them to bear their own costs throughout.

BY THE COURT :—In accordance with the opinion of the majority, this appeal is allowed, the order passed by the High Court is set aside and that of the trial Court restored with costs throughout.

Appeal allowed.

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[END OF VOLUME (1961) II M.L.J. REPORTS (S.C.).]